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THE INSURANCE LAW JOURNAL.

VOL. XVI

JANUARY, 1887.

No. 1.

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

UNITED STATES CIRCUIT COURT.

WESTERN DISTRICT, TENNESSEE.

ROMAINE ET AL.

vs.

UNION INS. CO. ET AL.*

Service of a subpoena outside the judicial district is unauthorized and ineffective as compulsory process; but since the party may voluntarily appear, and the court thereby acquire the right to proceed with the case, it is not a question of jurisdiction, unless it happen that the plaintiff and defendant are citizens of the same State, or are otherwise wholly disqualified to sue each other in the Federal courts, in which event it does, in those courts, become a matter pertaining to their jurisdiction, to which objection may

* Decision rendered, August 9, 1886.

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be taken in any appropriate and convenient way; the mode being quite immaterial.

But in those cases where the court may proceed upon a voluntary appearance, such a service is a mere matter of irregularity, and the proper practice to avoid a waiver thereof is to obtain an order of the court for leave to enter a special appearance with the clerk, upon an undertaking to submit to the further orders of the court, if the objection should not be sustained; and, after such a conditional appearance, to move the court to discharge the service for the irregularity complained of, whatever it may be. The authorities examined, and practice explained.

In Equity.

Two insurance companies of Pennsylvania and one of Ohio were made defendants to this bill, along with citizens of Tennessee, inhabitants within this judicial district. The subpoena issued against all in the regular form, and was served by the marshal on the resident defendants; and, at the request of plaintiffs' solicitor, he returns that he sent copies of the subpoena and bill to Pennsylvania and Ohio, where the marshals of those districts served them, as they return and certify, upon the non-resident defendants, respectively. Thereupon the two companies belonging to Pennsylvania filed the following paper with the clerk:—

The Union Insurance Company and the Insurance Company of the State of Pennsylvania appear by their counsel, Messrs. Heiskell and Heiskell, for the sole purpose of moving the court to quash the return as to said companies, on the ground that it appears on the face of the bill and proceedings that said companies have no residence in the jurisdiction of this court, and no agent within said jurisdiction; and on the ground that the return of the officer in Pennsylvania, adopted by the marshal here, is not effective to bring said companies before this court; and said motion is made accordingly. The appearance is entered for no other purpose than as aforesaid, in order that steps may not be taken against said companies, which are not in any manner before the court, or subject to its jurisdiction.

HEISKELL & HEISKELL, Attorneys.

This motion was made to vacate the service and return as irregular and unauthorized by law. The plaintiffs opposed the motion, on the ground that it is a question of jurisdiction, to be presented only by plea, and that this voluntary appearance cures the irregularity, and submits the defendants to the jurisdiction of the court.

HEISKELL & HEISKELL, for the motion.

T. W. BROWN (R. G. BROWN with him), *contra*.

HAMMOND, J.

If the defendants had mistaken their remedy to be rid of this service, in view of the fact that it is apparent that they wish to appear specially, and only to take exception to it, and decline to

submit voluntarily to be made defendants here, I should have no difficulty in permitting them to amend the proceeding so as to accomplish their purpose by whatever method it might be properly done; for no court, in these days at least, ever holds a party to have abandoned or waived a privilege by any act which is done to assert it, if there be power to permit amendment of the proceeding, of which power there can be no doubt under our statute. Rev.St., § 954.

But, as this motion presents the important and recently much-mooted question as to the proper mode, in our Federal equity practice, of taking objection to the service of process, without such a waiver of this privilege as was enforced in *Jones vs. Andrews*, 10 Wall., 327, I have thought it best to look into it, particularly as I find that the practice of the Federal courts has not been at all uniform, for reasons that will be apparent on reading the cases, and remembering what is said about the peculiarities of the Federal courts, in this matter of taking objections to their jurisdiction, in *Rhode Island vs. Massachusetts* (12 Pet., 657, 718), which I shall not take space to quote. The jurisdiction of these courts, more than others, is restricted over persons, and to a greater extent formerly than now: *Ober vs. Gallagher*, 93 U. S., 199, 204. Hence an objection which, in the State practice or that of England, to which our equity rule 90 directs us, would be always a mere matter of irregularity, to be corrected on motion, may become, in the Federal courts, a formidable consideration of jurisdiction, to which exception may be taken by plea, demurrer, motion to dismiss, or by even mere suggestion, and by the court *mero mutuo*, whichever the party pleases to adopt; for there can be no waiver of it under any circumstances. But this distinction is often overlooked, which, coupled with the general tendency of all courts to disregard mere forms, and get at the thing to be done in any convenient way, has very much confused the practice. However, we can have no trouble in any case if we distinguish between a substantive objection to the jurisdiction, technically considered, and one for simple irregularity in the service of the process; because, as was said in *Drummond vs. Drummond* (2 Ch. App. Cas., 35), "much confusion has arisen by treating want of power to enforce jurisdiction as tantamount to want of jurisdiction."

Yet I must say, after a quite careful examination of the English practice, as it existed when our equity rules were adopted and since, that, in my judgment, it was and is competent, even where the denial of power over the person of the defendant goes to the extent of a denial of the jurisdiction of the court itself, to move to discharge

the service and vacate the process,—thereby accomplishing every purpose that would be accomplished by a demurrer or plea to the jurisdiction; and that technically that is the proper way to take the objection in a court of equity wherever the complaint is a want of power over the person, and not over the subject-matter of the suit, which technical feature results from the peculiar nature of pleas in equity as contradistinguished from their uses in pleadings at law; the latter going to the writ, while in equity there is no such thing as a plea to the writ, but only to the bill, or in bar of the relief sought by it: 2 Daniell, Ch. Pr. (1st Ed.), 136. In *Foley vs. Maillardet* (1 De Gex, J. & S., 389), there was such a motion, supported by affidavit, to show that the service was not within the authority of the act of parliament; precisely as if, under the eighth section of our act of congress of March 3, 1875,—chapter 137, 18 St., 472; Rev. St. (2d Ed.), § 738—a defendant should wish to show that he did not come within the act, and move to vacate the notice or process served upon him. So I do not see why he may not, when served in any case, outside of that section, specially appear to make known his unwillingness to voluntarily submit to the court, as under some circumstances he might wish to do, and move to vacate the service; and this whether his voluntary appearance and willingness to be bound by the court in that case would have given the court jurisdiction to proceed against him or not, that being wholly immaterial to the determination of the motion.

Take this case for illustration. If it appeared by the bill that the plaintiffs and these defendants were all citizens of the same State, the latter might demur for want of jurisdiction, or plead (if necessary to show the fact aliunde the bill), or the court would, however the fact should obtrude itself into the record, on its own motion, dismiss the bill; and, if the defendants appeared never so formally and generally, the result would be the same—the court could not possibly have jurisdiction. But also, the result would be the same if they should especially appear, and move to discharge the service as irregular, and should join, as they might in such a case, a motion to dismiss the bill; since there is no possible danger in bringing the objection to the attention of the court in any form. But if the fact be that the parties are of diverse citizenship, or the case be one arising under the constitution and laws of the United States, there could be then no question whatever of jurisdiction; for under our modern acts of congress, the court may acquire jurisdiction by voluntary appearance, and hence a demurrer or plea for want of jurisdiction would

be out of place; for non constat but that the defendants may appear thereafter, and at any time, if not on that service, on some other day, voluntarily and without any service at all. Hence it could not be proper to dismiss the bill for want of jurisdiction, but only to decline to proceed against their consent, by vacating the service, which is all the court could properly do. Except, therefore, in that class of cases, peculiar perhaps to the Federal courts, where, in certain situations of residence or citizenship, the power to proceed against the particular persons is wholly denied under all circumstances whatever, the objection that the defendants to a bill in equity have not been effectively served with process to bring them within the presence of the court for judgment, is not, as at law, one of jurisdiction to be pleaded by formal plea to the writ, but one of mere irregularity of process, properly cognizable on motion, according to a practice always prevailing, for that especial purpose; and, when the case falls within the exception just mentioned, it is immaterial, perhaps, save as a matter of convenience and permanency of record, how the objection be taken; because, however taken, it must prevail, as it is one that cannot be waived under any circumstances whatever. It is always safe, therefore, to appear specially and move to discharge the process in any case; for, as will be presently seen, if the court has acquired power, by the disputed process, over the person of the objector, to proceed against him, it is a preliminary condition on which he is allowed to make such appearance that, if the objection be decided against him, he shall submit to defend the bill as if duly served with process, and he will not be allowed to depart from the court without a more general appearance after having been permitted to appear specially to make his objection; and, if the service be effective, he must abide by it on that decision, and not challenge it again. But if the court can have no jurisdiction—that is to say, no power to acquire, by the legal service of process of any kind or anywhere, the authority over his person to proceed against him—he is not precluded from making that defense by any demurrer, motion, plea, or whatever method may be available to him after the one just mentioned has been decided against him, and he may at once proceed to make it.

But again, if the jurisdictional facts be undeniable—as when the plaintiff and defendant are of diverse citizenship, or when the case is one arising under the constitution and laws of the United States—it is all-important that the personal privilege (for it is nothing more than that) of being exempt from suit elsewhere than in the

judicial district where the party resides, or is lawfully served with process, shall be so asserted as not to bring the party within the category of one who has voluntarily appeared to defend the suit; thereby waiving all irregularities of process, but never any strictly jurisdictional objection to the bill, either as to its subject-matter, or its defect in the matter of parties improperly joined, or omitted to be joined, etc.

In the case of corporations like these defendants, of course other complications arise, not now presented for decision, but as to which, in view of the suggestions of the argument, it is not improper to say that they are resolvable by the same principle precisely. Corporations are entitled to the same exemption as natural persons from suits elsewhere than in the judicial district where they are domiciled or commorant, or where they may found doing business under circumstances subjecting them to the service of process in that place; and they may voluntarily appear, like other people, and waive this exemption or personal privilege.

Making all allowances then, for the peculiar phases of the subject arising out of the anomalous restrictions upon the Federal courts in the matter of their inability to proceed against persons occupying towards the plaintiff certain relations of citizenship, it will be found, I apprehend, that we deal with the objection just as other equity courts do in their normal action upon the subject.

Before going into the authorities to scrutinize the practice, I may usefully summarize the result of my investigations, by saying that in the many English cases examined I have found only one that is in any sense a departure from a familiar and quite uniform rule of practice, by which the defendant appeared in court, and took its leave, by an order for that purpose, to enter a special appearance; but this was never granted, for substantial reasons, except upon an undertaking or stipulation, contained in the order, that the defendant would submit without further process to the orders of the court if the point should be decided against him. Indeed, for this reason, it was known rather as a conditional than a special appearance before the registrar. With the exception of the failure to procure that leave of court in this case, and to enter into that undertaking, the practice adopted by defendants' solicitors is the correct one, considering the different structural organization of our courts. The only effect of that failure, if this motion should be denied because of it, would be to commence over again; for as I suggested at the outset of this opinion, the proceeding, like all others, is subject to amendment,

which is scarcely necessary in this case, as the illegality of the service is too plain for any dispute. But hereafter the order should be applied for, and the undertaking given, in all cases; because while, under our practice, it may not be as important as it formerly was under the English practice to hold the defendant in court for subjection to further essential processes before any progress can be made, and we may take a bill pro confesso on the service of subpoena alone, without appearance or further process to compel it, yet there may be circumstances, under equity rule 18, when the plaintiff would need the defendant in court as effectually as if he had in fact appeared generally under rule 17; wherefore this fundamental requirement of an undertaking to submit to the further orders of the court should not be abandoned. This undertaking, however, I need scarcely say, would not affect the right of the party to make any objection which he might have to the jurisdiction, any more than the effective service of process within the judicial district would affect that right; both these standing upon the same footing in that regard. And it is just here, in my judgment, that all the confusion of ideas arises; for, while this undertaking, formerly made under the English practice, had a larger purpose than under ours it can have, yet the ultimate result is the same; it being in both only the expression of a willingness to appear and defend the case, as if process had been regularly served; and it could never go any further than that under either practice. Neither can the court go any further in the absence of the undertaking, if, under our practice, it be deemed unnecessary to require it.

I have considered also, that the court may be in vacation, and before its leave could be had, a pro confesso might go under equity rules 18 and 19; but this is not important, because when the court does meet, it can set aside the pro confesso, and indeed all proceedings based on the irregular process and its service, if it be in fact irregular, and may at that time admit the defendant, upon a conditional appearance for that purpose, just as effectually as if the application were made at the return of the process.

In explanation of the English authorities about to be cited, it should be said that, unlike it is with us, nothing could be predicated upon the subpoena alone and its service except subsequent processes to bring the defendant into court, and his immunity from anything like a pro confesso, or decree without appearance, was complete; wherefore he need pay no attention to the subpoena or its irregularities until attachment issued to bring him into court,

and it was to discharge the attachment, or some subsequent process, that the defendant moved the court when he obtained leave to enter his conditional appearance. With possibly one or two doubtful exceptions, I find no case where there was any direct attack upon the subpoena itself before the attachment issued, and for the reason just stated. It was no process, but only a notification upon which to base subsequent process, and it was always treated as such: *Harrison vs. Rowan*, Pet. C. C., 489. If irregular, the subsequent process of arrest was ineffectual, and would be discharged; but within itself the irregularity was quite immaterial until something else was done. Even being in contempt did not preclude a motion to discharge for irregularity: 1 *Daniell*, Ch. Pr. (1st Ed.), 657, 681.

Necessarily, however, under our equity rules 7-19, inclusive, in our practice the objection for irregularity must be taken more directly to the subpoena itself; just as, for want of a registrar, a conditional or special appearance must necessarily be entered before the clerk under the implied authority of equity rule 17. Again, it may be stated that our equity rules, unlike almost every other system of practice now in vogue, keep up the necessity for a formal appearance preliminary to the right to take any step at all, although as a fact it is rarely ever done; the parties being content with that appearance which comes of taking some step by way of defense, whatever it be, as is done everywhere else, and particularly in the State courts: 1 *Daniell*, Ch. Pr. (5th Ed.), 536, note; *Sweeney vs. Coffin*, 1 *Dill*, 73. And this habit of disregarding the requirement of formal appearance has also done much to derange the practice.

When our rules were adopted, there were two methods and two places for making appearance, to be selected according to circumstances. A general appearance in the six clerks' office, and, after that was abolished, in the writ and record clerk's office, was a rather unceremonious affair, being a mere exchange of memoranda between the court clerks of the plaintiff and defendant, respectively. The failure to enter it had no such effect as we give it under our rules; it being merely the basis for subsequent compulsory process, and always voluntary. But, when this appearance had to be compelled, it was entered with the registrar, and more formally and ceremoniously. It was with that officer, under the leave of the court, and by special directions, that the conditional appearance with which we are dealing was entered as a preliminary foundation for the right to come before the court and move to discharge the compulsory process by which the defendant had been arrested, for irregularity in the

service of the subpoena, for the disobedience of which the compulsory process had been issued. If irregular, the disobedience of it was not wrongful, and the attachment was void. Mr. Daniell says :

It should be observed that, if there be any irregularity in the service of the subpoena, the defendant, if he means to avail himself of the objection, should not appear, as by doing so he will waive the irregularity. He should move to discharge the attachment when it issues: 1 Daniell, Ch. Pr. (1st Eng. Ed.), 565.

Again :—

It seems, however, to be necessary, before he moves to discharge the attachment, that he should enter his appearance with the registrar, which can only be done on his entering into an undertaking that the sergeant-at arms shall be sent against him in case he shall be found in contempt: id., note u.

The same practice is somewhat more elaborately stated in that first edition,—which is cited for reasons stated in the note to *Thomson vs. Wooster*, 114 U. S., 112, s. c., 5 Sup. Ct. Rep., 788, and *Anonymous*, 21 Fed. Rep., 766,—in the chapter on “Contempts,” and subsequently in the section relating to appearance with the registrar, where it is shown that there must be a preliminary order of the court, which point, however, is brought out more fully in the later editions, and by reference to the cases. It is also noted in other places relating to the mode of vacating the service of injunctions, etc.: 1 Daniell, Ch. Pr. (1st Eng. Ed.), 666; id., 619, 620; 2 Daniell, Ch. Pr. (1st Eng. Ed.) 13, 14, 15; 3 Daniell, Ch. Pr. (1st Eng. Ed.), 374; 1 Daniell, Ch. Pr. (5th Amer. Ed.), 453, note 6, 511, 512; 1 Newl. Ch. Pr., 66, § 1,249.

It is useful to observe that by the general orders of August, 1841, passed after Mr. Daniell wrote, but which are binding on us (see Mr. Justice Bradley’s note, 114 U. S., 112, and 5 Sup. Ct. Rep., 788,) the substance of the condition attached to the leave given by the court to enter a special appearance was changed to conform to the extensive alterations of the practice made by those orders. They abolished the necessity of any sergeant-at-arms process to compel appearance, and therefore the condition became “a consent of the defendant to submit to any process which the court might direct to be issued against him for want of appearance, in case the subpoena should not be set aside for irregularity.” 1 Daniell, Ch. Pr. (5th Amer. Ed.) 512; *Price vs. Webb*, 2 Hare, 511, which is a most instructive case on this subject, decided A. D. 1843. With us we do not seek to compel appearance at all, but only enforce the penalty of non-appearance by proceeding, in the further progress of the

case, *ex parte* and upon a *pro confesso*. But, as before remarked, since the plaintiff may yet need the defendant in court to compel an answer under our equity rule 18, and may not wish to proceed *ex parte* on *pro confesso*, it seems to me still essential to require that conditional undertaking as established under the order of 1841.

I had intended to cite somewhat extensively the far more instructive cases, but must be content with a less satisfactory reference to them. With the exception of *Cookney vs. Anderson* (31 Beav., 452, s. c., 1 De Gex, J. & S., 365), where the objection that a service abroad was irregular was held to be properly taken by demurrer,—the court treating it as a question of jurisdiction, very much as our Federal courts mostly do, for reasons already explained,—there is no aberration in the English authorities from the practice I have indicated; and especially is this so with reference to this very objection of irregularity because of service upon persons abroad, to which many of these cases relate; for it is of very frequent occurrence in the English practice, where such service is permitted much more extensively than with us. The very next case in that book, *Foley vs. Maillardet*, *supra*, was one in which the regular practice was observed, and it may be noted that these cases were finally overruled on the merits by *Drummond vs. Drummond* (2 Ch. App., 35), but not on the point of practice, as to which no notice was taken on the appeal. Perhaps, if I may presume to say so, it would have been overruled in that respect also, if the effect of the judgment on appeal had not been to re-convert the question into one of mere irregularity, and not one of jurisdiction; which with us may nevertheless continue, for reasons I have sought to explain, to be an important line of demarkation in the process of classifying the cases. It may be a distinction of no importance now in English practice; while here, because of the peculiarity of our Federal jurisprudence, a case may sometimes fall within what Lord Westbury thought to be a category relating to the jurisdiction, and not a mere irregularity. But the resulting effect of it all is that with us, if the distinction be important, where it is in fact a question of jurisdiction, as I have defined it heretofore in this opinion, the objection may be taken in any way that suggests itself as convenient, and no harm is done, for the case must go out of court at all events, whether the practice be technically correct or not; but if it be a mere irregularity, as it always is if the court could, under any exigency of the case, acquire jurisdiction over the person of the defendant, orderly practice requires a conditional appearance and motion, and it is dangerous

to resort to any other, as it might involve a technical general appearance : *Travers vs. Bulkeley*, 1 Ves. Sr., 383; *Burton vs. Maloon*, 1 Barnard, Ch., 401; *Mackreth vs. Nicholson*, 19 Ves., 367; *Attorney-General vs. Earl of Stamford*, 2 Dick., 744; *Thomas vs. Earl of Jersey*, 2 Mylne & K., 398; *Anon.*, 3 Atk., 567 (where it was said that even after answer filed the defendant may be permitted to take advantage of irregularity in the subpoena under the peculiar circumstances; that it was necessary to file it in order to save an arrest on attachment during vacation); *Bound vs. Wells*, 3 Mad., 434; *Frowd vs. Lawrence*, 1 Jac. & W., 655; *Levi vs. Ward*, 1 Sim. & S., 334; *Robinson vs. Nash*, 1 Anstr., 76; *Bourke vs. McDonald*, 2 Dick., 587; *Drummond vs. Drummond*, *supra*; s. c., 2 Eq. Cas., 335; *Earl of Chesterfield vs. Bond*, 2 Beav., 263 (where the motion was denied because the defendant had appeared generally, and "not conditionally, with the registrar, to enable him to argue the point"); *Kinder vs. Forbes*, 2 Beav., 503 (which is more nearly a direct attack on the subpoena than any case examined); *Davidson vs. Hastings*, 2 Keen, 509 (where an objection that the defendant could not be heard without "a conditional appearance with the registrar, to be void if the application should succeed, and good if it should fail," was allowed, and time given to enter such an appearance); *Phospho-Guano Co. vs. Guild*, L. R., 17 Eq. Cas., 432 (where an "order was made on the ex parte application of the defendant giving him leave to enter a conditional appearance, a conditional appearance was entered, and a notice of motion to discharge the order before entered allowing service abroad" was granted, and the motion heard); *Price vs. Webb*, *supra* (a most instructive case, wherein a defendant was allowed to correct a mistake in entering an appearance, and to take the objection for irregularity); *Maclean vs. Dawson*, 27 Beav., 25 (where the court felt compelled to adopt the practice under a kind of protest that the objection ought to be made by way of defense, just as counsel argue here, and as Lord Westbury ruled it should in *Cookney vs. Anderson*, *supra*; s. c., 4 De Gex & J., 154, on appeal, where the court said: "I think that if a defendant is advised that the discretion which the court has with respect to service upon him abroad has been unwisely exercised in ordering such service, his proper course is to do what these defendants have done,—enter a conditional appearance with the registrar, and move to discharge the order for service"); *Inness vs. Mitchell*, 4 Drew, 141; s. c., 1 De Gex & J., 423; *Meiklan vs. Campbell*, 24 Beav., 100; *Whitmore vs. Ryan*, 4 Hare, 612; *Lewis vs. Baldwin*, 11 Beav., 153; *John-*

son vs. Barnes, 1 De Gex & S., 129; *Menzies vs. Rodrigues*, 1 Price, 92 (where it was ruled on exception that the motion could be made directly without appearance; and, if appearance should be made by mistake, it might be stricken out; it was an equity case in the exchequer).

Our Federal cases are far less satisfactory, and show that but little attention has been paid to technical practice in a matter as to which there should be, perhaps, no requirement of technicalities; but yet as to which they do exist in our own practice, and have been recently much relied on, as here, to lay hold of defendants, nolo volens, and force them to submit to be sued outside of their bailiwick; and this must be my apology for so much laborious attention to a matter of this kind. In examining the Federal cases, it must not be forgotten that, while the practice in courts of equity and admiralty is somewhat analogous, the restrictions of the eleventh section of the judiciary act of 1789 are held not to apply in admiralty, where non-residents may be sued by original attachment, and where I assume (for I do not stop to inquire into that) they may be effectively served abroad, if not by statutory authority or under the rules, then according to the inherent powers of the court,—very much as such power has long been claimed by the English court of chancery, and as that court has been aided in doing by acts of parliament and general orders regulating its exercise. Again, the practice in courts of law is to plead in abatement to the writ any ineffectual, irregular, or defective service thereof, and in those courts any want of power over the person of the defendant is one of jurisdiction of the court, because those courts, speaking broadly, proceed against the defendant's property, while a court of chancery proceeds only against his conscience by personal coercion; the one by writ mesne and final, and the other by notice only and decree; but likewise, in a law court, there should be a special appearance to make that plea. And, even then, if the objection be not to the writ, but only to irregularity in the use of the process, the technical practice is a motion to quash. And yet, again, we must remember that while the eleventh section of the judiciary act of 1789 applies equally to both our courts of law and equity, whereby the objection we are considering may become one of jurisdiction in either, the mode of taking the objection is not the same because of these congenital distinctions in practice.

And still another matter should be observed in this connection. The code practice of the different States has assimilated the practice

in courts of law rather to the equity models than to those pertaining in courts of common law; and we find, therefore, in a great many cases both at law and in equity, that this objection to the service of process is taken, as is done in the code practice, by a motion to quash; the matter of distinction between writ and process and between general and special appearances being wholly disregarded, or, what is the same thing, whichever kind of appearance be necessary is implied, but rarely ever formally made, because all formal appearances have fallen into desuetude. If, while among the cases, we keep in view these distinctions, and observe that the eleventh section of the judiciary act of 1789 has been much changed by subsequent acts enlarging our jurisdiction, so that now we go almost to the limit of the constitution itself, we will find but little difficulty in understanding the cases, and the reasons why they have followed no particular practice. I have examined a great many cases to see precisely how the objection we have in hand, or any other of the like kind, has been made, and I think I may safely say that there is no way conceivable in which it has not been made, and not a case that undertakes to inform us how it should properly be done. I had thought to go through them seriatim in the citations here, but that treatment has so extended this opinion that I have been compelled, less instructively, to condense it by classifying the cases somewhat, and leaving the investigator to apply them according to the suggestions I have made; remembering that not many of them treat of the subject of practice at all, and are cited only as examples of what has been done under similar circumstances.

In the following cases the objection for irregularity was taken by motion to set aside the return, quash the subpoena, or dismiss the bill,—somewhat as is done in the English practice I have sought to explain, only no showing is made by the reports as to the mode of making a special appearance. It is sometimes stated by the report that there was a special appearance, but oftener there is no showing of that fact, and the truth is, I presume, but little attention was paid to that matter: *U. S. vs. Union Pac. R. Co.*, 98 U. S., 569, 579 (where it is said an appearance was made “*de bene esse*”); *Kentucky Silver Min. Co. vs. Day*, 2 Sawy., 668; *Jobbins vs. Montague*, 5 Ben., 422; s. c., 6 N. B. R., 509; *Hyslop vs. Hoppock*, 5 Ben., 447; *Pacific R. R. vs. Missouri Pac. Ry. Co.*, 1 McCrary, 647; s. c., 3 Fed. Rep., 772; *Eaton vs. St. Louis etc. Co.*, 7 Fed. Rep., 139; *Plimpton vs. Winalow*, 9 Fed. Rep., 365; *Provost vs. Pidgeon*, id., 409; *Forsyth vs. Pierson*, id., 801; *Massachusetts etc. Co. vs. Chicago etc. Co.*, 13 Fed. Rep.,

857; *Castello vs. Castello*, 14 Fed. Rep., 207; *Bowen vs. Christian*, 16 Fed. Rep., 729.

In the following cases the objection was taken in other modes, all of which I shall not, as I intended, critically review in this opinion. They can be explained, or the practice accounted for, by attention to the distinctions to which I have adverted; the general fact being that technical practice has been quite generally discarded, and nothing has been uniformly substituted. *Bell Telephone Co. vs. Pan Electric Telephone Co.*, ante, 625, where an alleged agent of defendant being served within the district, but who was in his own right also sued, appeared generally for himself alone, filed an affidavit denying the agency, or that the defendant company had any office, etc., and the counsel who appeared for this alleged agent moved to set aside the service, and it was done. No question was made on the point of practice, but it will be observed there was no appearance, general or special, of the defendant at all, and a stranger made the motion. *Atkins vs. Disintegrating Co.* (1 Ben., 118, s. c. 7 Blatchf., 555, and 18 Wall., 272) was an admiralty case, where the objection was taken by answer, and held to have been by that fact waived, and yet the point was saved by the stipulation in the case. *Paine vs. Caldwell*, 6 N. B. R., 558; *Tuckerman vs. Bigelow*, 21 Law Rep., 208; *U. S. vs. Ottman*, 1 Hughes, 313; *Harrison vs. Rowan*, Pet. C. C., 489 (where it was done by a plea which was held not to be a waiver, but afterwards the objection was held to have been waived by the formal appearance that had been made aliunde the plea); s. c., 4 Wash., 202; *Winans vs. McKean, R. & N. Co.*, 6 Blatchf., 215; *Van Antwerp vs. Hulburd*, 7 Blatchf., 426 (where the objection was taken by plea in abatement to the jurisdiction, substituted at the suggestion of the court for a motion to set aside the service, which, under the English practice, was wrong, and fatal under *Jones vs. Andrews*, supra); *Cushing vs. Laird*, 4 Ben., 70, and *The Othello*, 1 Ben., 43 (both in admiralty, where it is said so grave a question should not be raised by motion, but by plea at the hearing; but the objections stated would be obviated by putting the parties specially appearing to make the motion under the stipulation required by the English practice); *Pond vs. Vermont V. R. Co.*, 12 Blatchf., 280; *Ober vs. Gallagher*, 93 U. S., 199 (where the objection seems to have been taken by demurrer, though it was not an irregular service, so much as a suggestion that the act of congress should be construed as limiting the jurisdiction to a defendant residing in the State, for the defendant was in fact "found" within the district); *Hale vs. Conti-*

mental Life Ins. Co., 12 Fed. Rep., 359. *McCoy vs. Cincinnati etc. R. Co.* (13 Fed. Rep., 3), was a plea to the jurisdiction, but Judge Barter intimated the distinction between a question of jurisdiction and one of mere irregularity of the service by saying that the objection as argued was "broader" than the plea, "which did not deny service of the process, or raise any question of its regularity or legal sufficiency." In *Steam Stone etc. Co. vs. Jones* (13 Fed. Rep., 567, 572) objection to a writ of sequestration was made by answer, but it pertained not at all to the appearance of the party, but only to the efficacy of the writ to secure the decree, like an objection to ancillary attachment. *Beach vs. Mosgrove* (16 Fed. Rep., 305) was a bill of review to set aside a decree pro confesso, based on irregular service; and so it was in *Hartley vs. Boynton*, 17 Fed. Rep., 873. But here it may be remarked that while it is entirely competent, of course, by appeal or bill of review, or such like proceeding, to undo all that has been done upon irregular service, if no appearance has been made either formally or impliedly by some step that binds the party to an appearance, and consequent waiver of the objection, it is equally competent, at that stage of the case, also to make a special appearance, and move to vacate all the proceedings and the service; for it is wholly immaterial, under the English practice, at what point in the proceedings the motion is made, and that is at every stage the customary way of accomplishing that result. This was done in an admiralty case, in *Hardy vs. Moors*, 4 Fed. Rep., 843. In *Sharon vs. Hill* (26 Fed. Rep., 722) there was a plea denying the averment of adverse citizenship, and it was clearly a question of jurisdiction, and the case is a perfect illustration of the distinction on that subject to which I have called attention. So *Christmas vs. Russell* (14 Wall. 69) is another illustration of it.

I had noted a considerable number of cases on the law side of the Federal courts for citation, but shall discard them with the remark that many of them show that this objection, under the influence of loose practice, is made, even in those courts, by motion to quash the service, and not by plea in abatement, sometimes on a showing of special appearance, but generally that is not shown, and can only be implied from the nature of the proceeding. In the code practice cases that is almost the uniform way. Both in law and equity cases this matter of a formal and preliminary appearance is everywhere disused, notwithstanding the rigid and technical enforcement of the rule that a general appearance operates as a waiver of the objection we are considering, and that it must be taken by a special appear-

ance for that purpose. But the fact is that appearances are rarely formally entered as such, notwithstanding our equity rule 17; the solicitor simply entering his name on the docket, and appearing by whatever step he may take in pleading. This, of course, is a general appearance, and waives every mere irregularity, but never any jurisdictional question; the cases showing that the Federal courts, and especially the supreme court, are the most exacting of all in regard to these two rules. If a special appearance is desired, it seems to be accomplished by some mere statement of counsel that he so appears, or it is left to mere implication from the step he takes; and wherever the fact appears that he so limits his appearance, no matter how, no courts are more liberal than the Federal courts—and all are so—in giving effect to that intention, without regard to any technical requirement of the practice in that behalf: *Harkness vs. Hyde*, 98 U. S., 476. I shall merely cite the cases I have classified under the general head of “Appearance” to establish these views; but it is shown by all the cases more by an exhibition to their disregard of technical forms than by any decisions or discussions on the subject. The general result is that the party must manifest an intention to appear specially, or he will be rigidly held to have appeared generally; particularly by taking any step that can be taken only by such an appearance; but the courts have not been exacting to require the manifestation of the intention to appear specially in any particular way whatever. In *Jones vs. Andrews*, *supra*, the point whether a motion to dismiss because the bill did not show a proper relation of citizenship of the parties in such a way as to exhibit the jurisdictional fact, would be voluntary or general appearance, was reserved; for, being coupled with another motion which certainly had that effect, it did not need to be decided. But in *Herndon vs. Ridgway* (17 How., 424), there was both a motion to dismiss and a demurrer on the ground that the service of process was ineffectual, and the bill was dismissed. There was no showing of a special appearance in a technical or any way, but doubtless it was treated as such. The other cases will not be more particularly noticed than by citation: *Butterworth vs. Hill*, 114 U. S., 128; s. c., 5 Sup. Ct. Rep., 796; *Harkness vs. Hyde*, 98 U. S., 476; *O’Hara vs. MacConnell*, 93 U. S., 150; *Maxwell vs. Stewart*, 22 Wall., 77; *Creighton vs. Kerr*, 20 Wall., 8; *Atkins vs. Disintegrating Co.*, 18 Wall., 272; s. c. 7 Blatchf., 555, and 1 Ben., 118; *Eldred vs. Bank*, 17 Wall., 545; *Shelton vs. Tiffin*, 6 How., 163; *Farrar vs. U. S.*, 3 Pet., 459; *Gracie vs. Palmer*, 8 Wheat., 699; *Patterson vs. U. S.*, 2 Wheat., 221; *Pollard*

vs. Dwight, 4 Cranch, 421; Knox vs. Summers, 3 Cranch, 496; Furnace Co. vs. Moline etc. Works, 18 Fed. Rep., 863; Small vs. Montgomery, 17 Fed. Rep., 865; Graham vs. Spencer, 14 Fed. Rep., 603; Sweeney vs. Coffin, 1 Dill, 73; Dorr vs. Gibboney, 3 Hughes, 382; Silver Min. Co. vs. Day, 2 Sawy., 468; Virginia etc. Co vs. U. S., Taney, 418; McCoy vs. Lemons, Hemp., 216; Harrison vs. Rowan, Pet. C. C., 489.

That this objection is not one of jurisdiction, but only a personal privilege which may be waived, is conclusively established by the following and all the cases cited in this opinion; but to understand them the fact must be borne in mind that in the Federal courts there is always a further question which may be involved in the consideration, or confused with it, and which it is always important to separate, namely, whether the case be one of Federal cognizance at all or not, by reason of diversity of citizenship, or the subject-matter of the suit; and that is a question of jurisdiction : *Ex parte Schollenberger*, 96 U. S., 369; *Ober vs. Gallagher*, 93 U. S., 199; *Christmas vs. Russell*, 14 Wall., 69; *Jones vs. Andrews*, 10 Wall., 327; *Rhode Island vs. Massachusetts*, 12 Pet., 657; *Toland vs. Sprague*, id., 300; *Gracie vs. Palmer*, 8 Wheat., 699; *Russell vs. Clark*, 7 Cranch, 69, 99; *Pond vs. Vermont V. R. Co.*, 12 Blatchf., 280; *Goodyear vs. Chaffee*, 3 Blatchf., 268; *Segee vs. Thomas*, id., 11; *Picquet vs. Swan*, 5 Mason, 35; *Flanders vs. Aetna Ins. Co.*, 3 Mason, 158; *Kitchen vs. Strawbridge*, 4 Wash. C. C., 85; *Harrison vs. Rowan*, Pet. C. C., 489.

The leading case of *Toland vs. Sprague* (12 Pet., 300), approving *Picquet vs. Swan* (5 Mason, 35), establishes that with us process cannot be served outside the district, and be effective, if objection be made; and the subsequent decisions abundantly support it. *Ex parte Schollenberger*, 96 U. S., 369; *Ober vs. Gallagher*, 93 U. S., 199; *Galpin vs. Page*, 18 Wall., 350; *Chaffee vs. Hayward*, 20 How., 208; *Herndon vs. Ridgway*, 17 How., 424; *Levy vs. Fitzpatrick*, 15 Pet., 167; *Russell vs. Clark*, 7 Cranch, 69, 99; *Parsons vs. Howard*, 2 Wood, 1; *Pacific R. R. vs. Missouri Pac. Ry. Co.*, 1 McCrary, 647; s. c., 3 Fed. Rep., 772; *Hyslop vs. Hoppock*, 5 Ben., 447, 533.

But, if we are to have technical practice in making the objection, it must be done, in a Federal court of equity, in the way I have indicated; for that was the uniform method in the English court of chancery at the time our equity rules were adopted. There is no doubt of this, and, as long as equity rule 90 exists, this practice must be followed, if insisted upon, no matter how much the practice has been disregarded by our courts. Motion granted.

UNITED STATES CIRCUIT COURT.

WESTERN DISTRICT OF TENNESSEE.

HENNING

vs.

PLANTERS' INS. CO.*

It is a rule of inter-State or international law that the courts of another State will not receive, as evidence of a foreign judgment, in a suit brought upon it, any record thereof which does not show on its face that the defendant, if a foreign corporation, was doing business in that State. This is a substantive jurisdictional averment that must affirmatively appear, and not be left to any inference from the bare return of the officer that he has served an "agent."

Nor can parol or other proof of the fact be received in aid of the defective record, if the averment does not appear therein.

ELLETT & HOUSTON, *for Plaintiff.*

T. B. TURLEY, *for Defendant.*

At Law.

This was an action upon the judgment of a State court in Illinois, and the facts are stated in the opinion. It appears by the proof which was rejected that the defendant company issued the policy of insurance through a broker at Chicago, and that it had issued many other policies through that and other brokers; the business all being done by mail, and the policies sent to and delivered at Chicago. The company did not comply, nor attempt to comply, with the statutes of Illinois regulating the business of foreign insurance companies in that State, and appointed no agent to receive service as

* Decision rendered, August 30, 1896.

required. The agent served was the broker, through whom the policy was issued, and he had then ceased, in fact, to be a broker for defendant, though whether he had ceased to be an "agent" for the service of process was a contested fact, or inference of fact, depending on the phraseology of the Illinois statutes.

The defendant pleaded a special plea, denying that it was doing business in the State, or that the broker was its agent, and averring that the judgment was void, to which the plaintiff replied, and issue was joined; the plaintiff offered in evidence the record, which was objected to, and depositions, to show the facts already stated. The defendant offered proof to show that Mitchell was only its broker in each transaction, etc. The case was submitted, upon stipulation, to be tried without a jury.

HAMMOND, J.

On the authority of the case of *St. Clair vs. Cox* (106 U. S., 350, s. c., 1 Sup. Ct. Rep., 354), it is my opinion that the judgment here must be for the defendant company. Mr. Justice Field there says:

It is sufficient to observe that we are of opinion that, when service is made within the State upon an agent of a foreign corporation, it is essential in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record—either in the application for the writ, or accompanying its service, or in the pleadings, or the finding of the court—that the corporation was engaged in business in the State. The transaction of business by the corporation in the State, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there, would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another State, to show that the agent stood in no representative character to the company; that his duties were limited to those of a subordinate employe, or to a particular transaction; or that his agency had ceased when the matter arose.

In the record, a copy of which was offered in evidence in this case, there was nothing to show, so far as we can see, that the Winthrop Mining Company was engaged in business in the State when service was made on Colwell. The return of the officer, on which alone reliance was placed to sustain the jurisdiction of the State court, gave no information on the subject. It did not, therefore, appear even *prima facie* that Colwell stood in any such representative character to the company as would justify the service of a copy of the writ on him. The certificate of the sheriff, in the absence of this fact in the record, was insufficient to give the court jurisdiction to render a personal judgment against the foreign corporation. The record was therefore properly executed.

The return thus declared against was that the officer had served a copy of the writ "by delivering the same to Henry J. Colwell,

Esq., agent of said Winthrop Mining Company, personally, in said county." Here the return is :—

Served this writ upon the within-named defendant, the Planters' Insurance Company, by delivering a copy thereof to and leaving same with Charles P. Mitchell, agent of said company, this fifteenth day of January, 1885; the president of said company not found in my county this fifteenth day of January, 1885.

We look in vain for any suggestion, even, in the record that the defendant was, at the time of bringing the suit, or that it had been theretofore, "doing business" in the State of Illinois. The præcipe does not suggest it, nor the writ, nor the return of service. From these it does not even appear that the defendant was a corporation foreign to the State of Illinois; and for all that is shown it might be a home corporation, as no distinction is intimated by the language used; it being simply, in common form, a suit against the Planters' Insurance Company,—whether a corporation or a partnership is not stated. The declaration does aver that the defendant is "a corporation organized and existing under the laws of the State of Tennessee, and having its principal office or place of business at Memphis, in said last-named State, and which has been duly summoned of a plea of trespass on the case upon promises," etc.; but nowhere is it even hinted that the defendant, so shown to be beyond the jurisdiction of the State, is "doing business" within it. The statement of the cause of action does not aid us in the least. It is not shown, even, that the plaintiff, or the firm of which he was receiver, were citizens of Illinois, nor that the policy was executed or delivered there, nor that there was the least connection between the transaction and the State of Illinois, or persons within, before or since, except the bare fact of the suit itself. The policy is set out in hæc verba in the declaration; and if we may look to this, which is doubtful, it appears to have been on its face a Tennessee contract, for it is stated to have been signed and sealed in the city of Memphis, and there is absolutely nothing to show but that all parties to it were in Memphis at the time. The property insured was in the State of Minnesota, so that we are without the least trace of any fact to show that the defendant company had, either in this particular transaction or any other, the least possible relation to the State of Illinois.

The judgment of the court is equally barren. It is a judgment by default, and the assessment of damages at \$2,600, as if upon a suit against an individual upon personal service. It is all left to

inference, based on the return of the sheriff that he had served defendant's agent, that this foreign corporation was "found" or "doing business" within the State of Illinois. But we have seen that, according to the Supreme Court of the United States, this inference will not do, and Mr. Justice Field makes the reason plain. An individual is always "found" where he is served, and cannot be served without such "finding," but a corporation is not, necessarily.

The sheriff may choose to serve anybody as agent; and wherever the suit be brought he could assume that any convenient person was "agent;" and if that simple return imports that the foreign corporation was "doing business" within the State, and that the person served was a proper "agent" to represent it, the whole jurisdiction would depend upon what may be a fallacious inference; for, in the nature of the thing, it does not essentially import that fact. Abstractly, perhaps, the same might be said of a service on agents or officers of a domestic corporation; but in that case there is a judicial knowledge, so to speak, of the corporations of the State, as to any particular corporation being engaged in business, as to the requirements of service on corporations, and the character of their organization and officers, which aids the service. Here—and particularly in this case, for I have shown that every suggestion of this record is against the notion that this company was doing business or that this transaction was within this State—the substantive fact to support the service, that the corporation, namely, was "doing business," or was "found" doing business, in the State, is wholly wanting in this record, and cannot be supplied by that sort of general knowledge of which I have spoken as existing in relation to domestic concerns. It is a general rule that a special jurisdictional fact outside the ordinary and intrinsic situation of the thing shall be specially averred in pleading, and certainly that which is contrary to that ordinary course of things should be averred, to give the court knowledge of the fact. Of course, a pleader need not state his evidence in the pleading, but he must aver the conclusion of fact in some form sufficient to show it, however generally. Precisely how this averment should be alleged or shown by the record may be difficult to say, for it is a remarkable fact that until 1872, when the case of *Newby vs. Von Oppen* (L. R. 7 Q. B., 293) occurred, there was never any suit against a foreign corporation in a court of law in England. Reasoning by analogy from the practice of averring the jurisdictional facts as to the citizenship of the parties to a suit in the Federal courts, it might be enough to simply aver the general fact that the defendant "is doing business

within this State" in the declaration, or elsewhere in the technical record.

Nor can the want of such averment or showing in the record as the supreme court demands be supplied by proof aliunde the record, offered at the trial of the subsequent suit predicated on the alleged judgment. The defects of the record cannot be so pieced or patched up by parol.

Mr. Justice Cooley says in *Montgomery vs. Merrill*, 36 Mich., 97, s. c. 25 Mich., 73:—

We think, also, that the court was right in rejecting the evidence offered by the plaintiff on the trial to show that Sidney Ketchum was in fact the last president of the bank. Jurisdictional facts cannot rest in parol, to be proved in one case, and perhaps disproved in another. The record must be complete in itself: 1 Whart. Ev. (2d Ed.), § 824.

Nor is this a case of local Illinois law, to be binding here if binding there. This judgment might be good there, and not good here, in this proceeding, as evidence of its existence. Mr. Justice Gray well expresses the rule on that subject in *Hart vs. Sansom* (110 U. S., 151, s. c., 3 Sup. Ct. Rep., 586), where he remarks:—

The courts of the State might perhaps feel bound to give effect to the service made as directed by its statutes. But no court deriving its authority from another government will recognize a merely constructive service as bringing the person within the jurisdiction of the court. The judgment would be allowed no force in the courts of any other State, and it is of no greater force, as against a citizen of another State, in a court of the United States, though held within the State in which the judgment was rendered: *id.*, 155.

And see *Town of Pana vs. Bowler*, 107 U. S., 529, 545; s. c. 2 Sup. Ct. Rep., 704.

It is an international or inter-State consideration as affected by our constitution: Article 4, § 1: The court started out, under the lead of Mr. Justice Washington, to construe that requirement into a rule of absolute verity for all judgments of another State, and respectable and high authority is not wanting to show that such is the proper international doctrine; but in the conflict over the point, not settled when our constitution was made, there has been evolved a general consensus of opinion that the courts of another State will not give effect to the judgment unless it appear by the record that the court had potential jurisdiction over the person of the defendant; and, if the record show that,—which this does not,—then the defendant may contradict it by proof, in order to save his rights of "natural justice," whatever that may mean. Whart. Conf. Laws (2d Ed.), § 646 et seq.; *Moulin Insurance Co.*, 24 N. J. Law, 222; s. c. 25

N. J. Law, 57. And it will be found from the cases cited that, beginning with *Pennoyer vs. Neff* (95 U. S., 714), the supreme court has vigorously laid hold of this rule with a deliberate purpose to protect in the most thorough manner all non-residents against judgments where there is no personal service, except so far as the State rendering them has property within its borders to satisfy them by its own execution of them. Elsewhere, except to that extent, they are utterly void. This case of *St. Clair vs. Cox*, *supra*, is one of the series, and it establishes, as an element of this protection, that, when foreign corporations are sued, the record must show affirmatively, not only that there was service upon an "agent," but that the corporation was in fact "doing business" in the State. This latter fact being shown, the court will assume, in the absence of proof to the contrary, that the party returned served as "agent" was in fact the representative of the corporation, but not otherwise.

What facts will constitute "doing business" within a State we need not decide; nor whether, on the facts of this case, as shown by proof taken in support of defendant's special plea that it was not doing business there, and that Mitchell was not its "agent," this defendant was "found" by its "agent," either perforce of the Illinois statutes in that behalf, or of the general law. It is sufficient here that the defendant's objection to the admission in evidence of the plaintiff's record must prevail. However it may be under the laws of Illinois, that record does not, under the international or inter-State law, disclose the fact that this defendant was doing business in that State, and the fact cannot be now proved in aid of the record. Judgment for defendant.

COURT OF APPEALS OF NEW YORK.

ANNA W. DWIGHT AND OTHERS, EXECUTORS ETC.,
Respondents.

vs.

GERMANIA LIFE INS. CO., *Appellant.**

The application which was a warranty contained the following questions and answers:—

“A. For the party whose life is proposed to be insured, state the business carefully specified.” Ans. “Real estate and grain dealer.” “B. Is this business his own or does he work for other persons, and in what capacity?” Ans. “His own.” “C. In what occupation has he been engaged during the last ten years?” Ans. “Real estate and grain dealer.” “D. Is he now, or has he been engaged in or connected with the manufacture or sale of any beer, wine or other intoxicating liquors?” Ans. “No.” The evidence was undisputed that the applicant had previously been engaged in the business of keeping a hotel at Binghamton from May, 1874, until March, 1877, and that during that period he regularly and systematically sold wines and liquors in bottles of various sizes, bearing the name of his hotel blown into the glass, to such of his guests as desired them. He kept a wine or liquor room in which was stored a large supply of wines and liquors, and each year while so engaged he applied, paid for, and received from the representatives of both the State and national governments licenses and permits authorizing him to carry on the business of selling beer, wine, and liquors at retail, to be drunk upon his premises. It also appeared that he kept no bar and did not sell to persons who were not his guests.

Held, That these facts constituted a breach of warranty as a question of law, and it was error to submit the question to a jury as one of fact.

There was no evidence that insured had ever been engaged in real estate or grain business, beyond a temporary speculation in grain and building upon some property belonging to his wife; the history of his life as related by himself, showed that his only occupation had been that of a hotel keeper.

* Decision rendered, October 12, 1886.

Held, That the statements regarding his business were false and a breach of warranty, and should have been so ruled as a question of law.

A mere scintilla of evidence will not justify submission to a jury. If the proof be so overwhelming that a contrary verdict should be set aside the issue should be decided by the court.

JOSEPH LABOCQUE & WM. M. EVARTS, *for Appellant.*

ISAAC S. NEWTON, *for Respondents.*

RUGER, C. J.

At the close of the evidence on the trial, the defendant moved for a dismissal of the complaint upon the ground, among others, that the uncontradicted evidence showed that the answers made by the assured to certain questions in the application for insurance were false and untrue and constituted a breach of warranty which avoided the contract. The trial court denied the motion and the defendant excepted. A further motion was thereupon made for the direction of a verdict in favor of the defendant upon the same grounds, which was also denied by the court and an exception was taken thereto.

The main question in the case which we shall discuss arose over the validity of these exceptions. It was assumed both by the trial court and by the general term, that by the terms of the policy the assured warranted the truth of the several answers referred to, and that therefore compliance with such warranty was a condition of the validity of the contract of insurance. This determination of the courts below was properly acquiesced in by the counsel for the respondents upon the argument before us, as it could not have been successfully questioned.

It must therefore be assumed in the further consideration of this case that any substantial deviation from the truth in the answers so given was material to the risk and constituted a breach of the terms of the contract, rendering the policy based upon such answers void: *Armour vs Transatlantic Fire Ins. Co.*, 90 N. Y., 450.

Parties to an insurance contract have the right to insert such lawful stipulations and conditions therein as they may mutually agree upon or which they may consider necessary and proper to protect their interests, and which when made must be construed and enforced like all other contracts according to the expressed understanding and intent of the parties making them. If an insurance policy in plain and unambiguous language makes the observance of an apparently immaterial requirement the condition of a valid contract, neither courts nor juries have the right to disregard it or to construct by implication or otherwise a new contract in the place of

that deliberately made by the parties: *Appleby vs. Astor Fire Ins. Co.*, 54 N. Y., 253; *Foot vs. Astor Ins. Co.*, 61 N. Y., 591; *Graham vs. Fireman's Ins. Co.*, 87 N. Y., 69; *Armour vs. Transatlantic Fire Ins. Co.*, *supra*.

Such contracts are open to construction like all other contracts needing interpretation, but are subject to it only when upon the face of the instrument it appears that its meaning is doubtful or its language ambiguous or uncertain: *May on Insurance*, 172. An elementary writer says: "Indeed the very idea and purpose of construction imply a previous uncertainty as to the meaning of a contract, for when this is clear and unambiguous there is no room for construction and nothing for construction to do." 2 *Parsons on Contracts*, 500. The same author says, "that courts cannot adopt a construction of any legal instrument which shall do violence to the rules of language or the rules of law," and quotes the language of Lord Chief Baron Eyre in *Gibson vs. Minet* (1 H. Bl., 569), that "all latitude of construction must submit to this restriction, namely, that the words may have the sense which by construction is put upon them:" *id.*, 494. In *Parkhurst vs. Smith* (Willis R., 332), Willis, J., says: "I admit that though the intent of the parties be never so clear it cannot take place contrary to the rules of law, nor can we put words in a deed which are not there, nor put a construction on the words of a deed directly contrary to the plain sense of them." *Addison on Contracts*, p. 165, lays down the rule that "the judgment of the court in expounding a deed must be simply declaratory of what is in the deed. It has to ascertain, not what the party intended, as contradistinguished from what the words express, but what is the meaning of the words he has used," and "when the words of any written instrument are free from any ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or to the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, and common meaning of the words themselves, and evidence dehors the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties is utterly inadmissible:" *Shore vs. Wilson*, 9 Cl. & Fin., 565.

In considering the language of an insurance contract, the words of a promise are to be regarded as those of the promisor, while those of a representation upon which the promise is founded are the words of the promisee, and are to be taken most strongly against the party

using them: May on Insurance, sec. 175. In view of the fact that these principles have been plainly disregarded by the courts below, we have thought it proper to refer more extensively to elementary authors than would otherwise have been deemed necessary. Their application will be seen by an examination of the situation of the case at the time the objectionable rulings were made.

Among the facts which the defendant deemed it important to know before entering into a contract insurance with the deceased, was his previous business and occupation. The materiality of truthful information in relation thereto was impressed upon the applicant by specific inquiries, and the requirement that truthful answers thereto should be made the condition of a valid contract. With the view of eliciting the information desired, a series of questions was proposed to the deceased embracing not only an inquiry as to his general business and occupation, but special inquiries as to certain particular trades and employments. Among those which we deem it important to refer to in this case were the following:—

“A. For the party whose life is proposed to be assured, state the business carefully specified.” Ans. “Real estate and grain dealer.”

“B. Is this business his own or does he work for other persons, and in what capacity.” Ans. “His own.”

“C. In what occupation has he been engaged during the last ten years?” Ans. “Real estate and grain dealer.”

“D. Is he now, or has he been engaged in or connected with the manufacture or sale of any beer, wine, or other intoxicating liquors?” Ans. “No.”

An application dated August 28, 1877, containing the questions and answers stated was signed by Walton Dwight in his character of an applicant for insurance, and also in that of the assured, and was delivered by him to the defendant. In pursuance of the request contained therein, the defendant on August 28, 1878, delivered to the applicant the policy in suit, containing among others these provisions: “This policy is issued, and the same is accepted by the said assured upon the following express conditions and agreements; that the same shall cease and be null and void and of no effect * * * if the representations made in the application for this policy, upon the faith of which the contract is made, shall be found in any respect untrue.

Dwight died Nov. 15th, 1878, immediately before the payment of a second quarterly premium became due; and this action was commenced in April, 1879, about seven months after the delivery of the policy.

Upon the trial it appeared that Dwight was engaged in the business of keeping hotel at Binghamton, from May, 1874, until March, 1877, and that during that period he regularly and systematically sold wines and liquors in bottles of various sizes, bearing the name of his hotel blown into the glass, to such of his guests as desired them. He kept a wine or liquor room in which was stored a large supply of wines and liquors, and each year while so engaged, he applied, paid for, and received from the representatives of both the State and National governments licenses and permits authorizing him to carry on the business of selling beer, wine, and liquors at retail, to be drank upon his premises. It also appeared that he kept no bar and did not sell to persons who were not his guests. These facts were undisputed. Their absolute truth was assumed by the trial judge in charging the jury and by the general term in passing upon the appeal to that court.

That the answer given by Dwight to the questions relating to the sale of liquor was incorrect, was admitted by both tribunals. That Dwight did not misconceive the meaning and intent of the question conclusively appeared from repeated answers made by him to other companies within three weeks prior to this time to similar questions in applications for other insurance in which he stated that he had kept a hotel for three years in which liquor was sold in packages.

Upon denying the motion for a nonsuit, the trial court refused to pass upon the question as to whether the facts constituted a breach of warranty or not, but left it to the jury to say whether the sales of liquor proved to have been made were sales at all within the intent and meaning of the contract. In this we think that the court erred, no question arising upon the evidence which authorized its reference to the jury. If there was any room for doubt in respect to the true meaning and intent of the inquiry answered by the deceased, it presented a question of law for the court to determine, and not one for the jury: *Lomer vs. Meeker*, 25 N. Y., 361; *Glacius vs. Black*, 67 N. Y., 563. But we are of the opinion that no such doubt existed in the case.

The contract was in writing subscribed by the parties and they expressed their agreement in clear, unambiguous, and intelligible language. Its import and meaning was not obscured by any reference to the situation and circumstances surrounding the transaction, or by the consideration of other parts of the same instrument. On the contrary, an examination of the context and associated questions make more certain and definite its object and intent. The assured

had been previously interrogated as to his general business and employment, and it is to be assumed had given such answers in respect thereto as satisfied the object of the inquirer.

He was then specially requested to state whether he was then,^o or had been, engaged in or connected with the manufacture or sale of any beer, wine, or other intoxicating liquors. The information called for was made material, not only by the express agreement of the parties, but also by the object for which it was required, plainly apparent from the nature of the transaction.

The question called for no opinion and was capable of a precise, definite, and categorical answer. It was intentionally framed in broad and comprehensive terms, apparently to avoid any evasion of its object, but was nevertheless expressed in clear and unambiguous language. If an intention to inquire concerning the conduct of the regular or principal business of the assured could be implied from the use of the word "engaged," an idea that such was the only meaning of the question was negatived by the further words, "or connected with the manufacture or sale of any beer" etc., which pointed unmistakably to every transaction of the kind described, however limited its character or remote his connection with it might have been.

The motive prompting the question was reasonable, natural, and proper, and apparent even to the most careless reader. The inquiry could not have referred to the general business employment of the insured, because inquiries on that subject had previously been exhausted and the question had no office to perform in that respect. It carried upon its face the object which the insurer had in making it, and required an answer as to whether the applicant was, or had been, engaged in or connected with the manufacture or sale of liquors etc., not in a limited or restricted capacity or employment, but in any and every way in which such acts could have been performed.

The question itself assumes that persons engaged in or connected with the manufacture or sale of liquors in any manner, were more hazardous subjects for insurance than those occupied in more reputable employments, and that the insurer would regard such employment as an objection to the proposed contract.

The extent to which the employment affected the character of the applicant, or his value as a risk, was a question solely for the insurer.

The defendant had a right to a full and frank disclosure of any and all facts bearing upon the subject, and this confessedly it did not obtain. It was misinformed as to the precise fact which had been

agreed upon as a fact material for it to know in determining the propriety of entering into the proposed contract and by the party who had assented to the proposition that such information should invalidate any contract made.

If the fair import of the language used indicates that the interrogator intended to include within its scope and meaning single transactions or incidental occupations, neither courts nor juries have authority to say that such transactions may properly be disregarded in the answer made. The defendant must be deemed to have meant what is said and its express language embraces all transactions, and its express contract has made every transaction of the kind referred to material to the risk.

The legal effect of this contract can be avoided only by making a new one for the parties, or denying any significance to language. We are unable to see any ground upon which the ruling of the trial court can be supported. The case of *Moulor vs. Am. Life Ins. Co.* (111 U. S., 335) has been cited as tending to support the ruling. The question there arose under an exception to so much of the charge of the trial judge as stated that if the answers to certain questions in the application then under consideration were untrue, the policy was void, whether the assured knew them to be so or not. The court held that a consideration of the language of the whole policy rendered it doubtful whether it was intended to warrant the absolute truth of the answers in question without regard to the good faith of the assured in making them, and therefore held as a question of law that the instructions were erroneous and the exception well taken. This decision undoubtedly accords with the well-settled doctrine on the subject, but is not an authority upon the question here presented. See *Armour vs. Transatlantic Fire Ins. Co.*, *supra*.

When the terms and language of a contract are ascertained, its meaning and intent present questions of law only, and it is the duty of the court and not of the jury to determine and declare what that is. Parsons in his work on contracts (Vol. 2, p. 492) says that the first rule in the construction of contracts is "that what a contract means is a question of law. It is the court, therefore, that determines the construction of a contract. If any one contract is properly constituted justice is done to the parties directly interested therein. But the rectitude, consistency, and uniformity of all construction, enables all parties to do justice to themselves. For then all parties, before they enter into contracts or make or accept instruments, may know the force and effect of the words they

employ, of the precautions they use and of the provisions which they make in their own behalf, or permit to be made by others. It is obvious that this consistency and uniformity of construction can exist only so far as construction is governed by fixed principles, or in other words is matter of law, and here arises the very first rule." This principal has been repeatedly approved and uniformly acted upon in the decisions of this court (*Groat vs. Gile*, 51 N. Y., 431; *St. Luke's Home vs. Association etc.*, 52 N. Y., 191; *Glacius vs. Black*, 67 N. Y., 563; *Arctic Fire Ins. Co. vs. Austin*, 69 N. Y., 470), and is the uniform doctrine of the cases and text books: *Levy vs. Godsley*, 3 Cranch, 180; *Short vs. Woodward*, 13 Gray, 86; *Smalley vs. Hendrickson*, 29 N. J. L., 371; *Denison's Ex'rs vs. Wertz*, 7 Serg. & R., 373; *Welsh, Admr., vs. Dusar*, 3 Binn, 329; *Parsons on Contracts*, 492; *Addison on Contracts*, 165 etc.

It would seem from the authorities hereinbefore referred to that no questions affecting the interpretation of contracts can properly be submitted to a jury except those arising upon conflicting evidence as to the terms of the agreement, or when extrinsic evidence raises some doubt over the identity of the subject matter, or of the claimants thereunder: *Addison on Con.*, p. 165. Instead of following the plain rule laid down in the authorities cited, the trial court assumed the existence of an ambiguity and referred the legal questions involved in the construction of the contract to the jury for their speculations. The logical effect of such a disposition was the holding that contracts expressed in the same language and executed under the same circumstances might legally be held valid in one locality and invalid in another, according to the capricious and often conflicting opinions of juries. The theory upon which the trial court submitted the case to the jury is implied from the circumstances pointed out in the charge for its consideration. Its attention was directed to the fact that Dwight kept no bar and did not sell liquor to people generally, but only to his guests, and as an incident to the business of keeping a hotel, and from the facts it was impliedly advised that it was authorized to find upon this question for the plaintiff. In other words the jury was instructed that, because the assured had not been engaged in or connected with the manufacture or sale of liquor, etc., in a particular way that he could truthfully represent that he had not been connected with it in any way, and if he did not sell to everybody without limitation or exception that he was justified in replying to the question that he did not sell to any one. The fallacy of such a charge is too plain for argument.

The defendant was further prejudiced before the jury by the reference in the charge to the claim made by the plaintiff that the question was incapable of a truthful affirmative or negative answer, for it was said if he had answered it affirmatively it would have been an admission of his connection with the manufacture of liquor which concededly was not true, and it was implied therefore that his only safe answer was a negative one. This circumstance was pointed out to the jury as having a bearing upon the question, and it was impliedly authorized to find that the question was equivocal because not capable of a direct and positive answer. The reference was obviously misleading and erroneous, for the interrogatory being in the alternative could truthfully have been answered in the negative only in case the assured had been engaged in neither of the occupations referred to, and would have been answered truthfully in the affirmative if he had been connected with either.

This error was further aggravated by the refusal of the court upon request to charge that the question could be truthfully answered in the affirmative if he had been connected with the sale of liquor. This refusal was clearly erroneous and the exception taken thereto was well taken.

We are, for the reason stated, of the opinion that upon this branch, the case presented no question for the jury, and the court erred in denying the motion for a nonsuit: *Lomer vs. Meeker*, 25 N. Y., 361; *Appleby vs. Astor Fire Ins. Co.*, *supra*; *Glacius vs. Black*, *supra*.

We are also of the opinion that the answers of the assured to the questions relating to his business and occupation were evasive and untrue, and upon the whole evidence required the dismissal of the complaint. There was not only an absence of satisfactory evidence in the case that he had ever been engaged in the business of a real estate or grain dealer for himself in the ordinary acceptation of those terms, but such an occupation was negatived by his repeated sworn declarations to the contrary, and the proof of circumstances of the most convincing character. The evidence upon these questions is substantially all to the same effect and presents a case so preponderating in character that a verdict against it could not be allowed to stand. The case, therefore, presented a question of law as to whether the business engaged in by the deceased constituted him a dealer in real estate and grain, within the ordinary meaning of those terms.

Undoubtedly the onus of showing the falsity of the representations made by Dwight, in respect to his business and occupation, rested

affirmatively upon the defendant; but when it had produced his sworn declarations made but a few months previous to the representations expressly negating their truth, and the story of his life had been testified to, showing his constant employment in other occupations, it had overcome the presumption of truth existing in favor of the representations and made a case calling for affirmative evidence to overthrow it. The plaintiffs, although surrounded during the trial with relatives and friends of Dwight, who were acquainted with his history and appeared as witnesses and detailed his former occupation and employment, gave no such evidence. There is not a scintilla of direct evidence that Dwight had ever been in business as a grain dealer, and the circumstances of his life, as disclosed by the proof, show that he could not have been so employed. He had never resided at Chicago, the alleged theater of his dealings in grain, and had never been there except for a short period in the spring and summer of 1878, during which he was a bankrupt, hopelessly in debt, and precluded much of the time by sickness from engaging in any business. The plaintiffs did not produce the slightest proof of any such occupation, and the only evidence referring to it was Dwight's statement made in a gasconading manner to one of the defendant's witnesses in June, 1878, and incidentally appearing in evidence in which he said "that he had been to Chicago and just returned; that he went there to make some money and went into partnership with a couple of brothers who had money but no experience, and he had experience but no money, and he wanted to operate in grain. In two transactions he cleared \$30,000, and was taken sick and his partners thought he made money so easy they could do the same, and while he was sick they in their operations lost the \$30,000 he had made, so that left him without a dollar." This declaration was obviously not made to inform any one as to his business, but apparently with the object of exalting his own sagacity and shrewdness, and if it could be considered any evidence of his calling, was of the most inconclusive character, and showed that the business, whatever it was, had been abandoned in June, 1878, and never after resumed. It falls far short of being sufficient to authorize the finding of a jury that he was a grain dealer, or that he was on the 22d day of August, 1878, and for ten years previous thereto had been, such dealer.

There is no evidence that during the ten years previous to the application, Dwight owned, bought, sold, or dealt in real estate. It did appear that at some period of his life he had owned scattered parcels of wild land in three or four different States; but previous

to the ten years referred to in the inquiry he had caused this property, so far as it had any appreciable value, to be conveyed to his wife, and it was thereafter owned by her and generally employed as security for borrowing money upon, probably for the purposes of its improvement. The evidence given to establish the falsity of the representations in question consisted largely of the sworn statements of Dwight, made between December, 1877, and March, 1878, in bankruptcy proceedings, in which he testified among other things, "I think I opened the Dwight House in May, 1874. I furnished part of it then, and ran it partly as a hotel and rented part of it in the spring of 1875." "The only business I had was the Dwight House business and livery. The other business was my wife's business, although I had always kept it as my own account." "I kept no open bar; liquors were sold in packages. I should think I had some two or three thousand dollars worth of those when I opened the house, the stock was larger then than at any time afterwards, that included liquors I took out of my private house, some six or seven hundred dollars worth of liquors that were not invoiced. I kept wines, liquors, and cigars all through my business. I say the Dwight House was the only business I had as a regular business." Q. "When did the Dwight House open?" A. "It opened in 1874, the 26th of May I think." Q. "And closed when?" A. "It closed the 8th day of March, 1877." Q. "I understand you made your settlement on your wife about when?" A. "It was done in the latter part of June or July, 1868." Q. "From that time down to the time of the commencement of the Dwight House business, had you any business of your own?" A. "I had not; not further than my law suits, general living, and the like of that. I had no business of my own." In addition to this explicit evidence of the untruthfulness of his representations, it appears from an examination of the application made by him for insurance during the month of August, 1878, that his representations as to his business and occupation were quite contradictory and misleading.

On July 31st, 1878, in his first application he describes himself as a general dealer in grain and produce, and his place of business as being mostly in Chicago. In subsequent applications he quite uniformly describes himself as a real estate and grain dealer, but occasionally varies the description by statements that "it was formerly real estate." "Real estate and grain dealing always." "Formerly same, speculator, army, hotel keeper." "Formerly same as now." "Real estate and grain dealer always." "Real estate and

grain dealer always, no change in occupation or employment." "Always been dealer in real estate and grain." It is quite impossible to reconcile these various statements with each other or with the established facts of the case.

The history of his life, as related by himself, shows that from 1866 to 1878 the only business or occupation pursued by him in his own name, was that of a hotel keeper. All allusion to this business is suppressed in the application in question. From 1868 to 1874 he was engaged in building upon and improving about thirteen acres of land in Binghamton, and if this afforded any justification for his description of business as a real estate dealer, the conceded ownership of such property by his wife rendered the declaration that such business was "his own" untrue.

The trial court, in charging the jury, stated that Dwight's sworn declarations as to his business and occupation did not constitute an estoppel against the plaintiff as to the truth of such statements. This may be admitted to be correct without invalidating their force as evidence of such facts, and in the absence of counter-vailing evidence became conclusive upon Dwight's representatives as to such facts.

It is quite clear that these answers gave no information as to the actual employment and business of Dwight to the defendant, and would have been quite as correct and satisfactory if he had represented himself to be a geologist or professor of elocution.

We think it was clearly the duty of the trial court upon this evidence to have directed a verdict for the defendant.

It is claimed by the plaintiffs that if there is a scintilla of evidence in support of a proposition, or if the evidence against it does not amount to a demonstration of its incorrectness, that a question is raised which must be left to the jury. We do not so understand the rule. If the proof of a fact is so preponderating that a verdict against it would be set aside by the court as contrary to the evidence, then it is the duty of the court to direct a verdict: *People vs. Cook*, 8 N. Y., 67; *Wilds vs. Hudson River R. R. Co.*, 24 N. Y., 433; *Appleby vs. Astor Ins. Co.*, *supra*; *Kelsey vs. Northern Light Oil Co.*, 45 N. Y., 509; *Cagger vs. Lansing*, 64 N. Y., 427; *Neuendorff vs. World Mut. Ins. Co.*, 69 N. Y., 392. It was said in *Baulec vs. N. Y. & Harlem R. R. Co.* (59 N. Y., 366) by Judge Allen that, "it is not enough to authorize the submission of a question as one of fact to the jury that there is 'some evidence.' A scintilla of evidence or a mere surmise that there may have been negligence on the part of the defendants would not justify the judge in leaving the case to the

jury," quoting from *Williams, J., in Toorney vs Railway Co.*, 3 C. B., (N. Y.), 146; See *Culhane vs. N. Y. Cent. etc. R. R. Co.*, 60 N. Y., 136; *McKeever vs. N. Y. Cent. etc. R. R. Co.*, 88 N. Y., 667. In *Wyatt vs. Johnson* (91 Pa. St. R., 200), Justice Sharrett says: "Since the scintilla doctrine has been exploded both in England and in this country, the preliminary question of law for the court is, not whether there is literally no evidence, or a mere scintilla, but whether there is any that ought reasonably to satisfy the jury that the fact sought to be proved is established." Citing *Rider vs. Wombwell L. R.*, 4 Exch., 39. The rule held by the Supreme Court of the United States is expressed by Mr. Justice Clifford in the *Improvement Co. vs. Munson* (14 Wall, 442) as follows: "Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what was called a scintilla of evidence in support of a case, the judge was bound to leave it to the jury; but recent decisions of high authority have established a more reasonable rule that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof rests. To the same effect are *Pleasants vs. Fant*, 22 Wall, 120; *Commissioners etc. vs. Clark*, 94 U. S., 284; *Greggs vs. Houston*, 104 U. S., 553; *Bailey vs. Cleveland Rolling Mill*, 21 Fed. Rep., 159; *Witherbee vs. Wasson*, 71 N. C., 451.

We think this a case where the conclusive character of the proof required the application of the rule, and that the court should have intervened to prevent a verdict upon evidence so insufficient to support it.

Many other questions arose under the various defenses presented upon the trial which would, if it were necessary to the decision of this appeal, be instructive and interesting to examine and discuss; but in the view we have taken it would be a work of supererogation to do so.

The questions arising over the defense that the whole scheme of of insurance conceived and carried into effect by Dwight, originated in a design to cheat and defraud the insurers; and the further allegation that Dwight's answer to the question whether he ever had the disease of spitting blood, are among the most prominent of those presented upon the argument.

The circumstances of the case are quite extraordinary and unnatural, and might well give rise to various and conflicting theories and conjectures in the effort to account for its strange and abnormal features ; but in view of the fact that a new trial must be ordered upon other grounds, it would serve no useful purpose to attempt to determine the questions raised thereby.

The judgments of the courts below are therefore reversed, and a new trial ordered with costs to abide the event.

All concur, except Danforth, J., dissenting, Miller, J., not voting, and Finch, J., taking no part.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

TRADERS AND MECHANICS' INS. CO.)

vs.

BROWN AND OTHERS.*

Where an insurance company is conducted upon the stock and mutual basis, the two departments being entirely distinct, the surplus earnings accumulated from the stock department should be distributed among the shareholders of the fund of that department, according to their several shares, on winding it up.

Bill in equity by the Traders and Mechanics' Insurance Company, conducting business upon stock and mutual principles, against Ephraim Brown and others, to determine upon what just and equitable terms and conditions, and in what manner, the plaintiff may discontinue its stock department, and cancel its guaranty capital, and to whom the surplus earnings accumulated to the stock department belonged. Hearing in the supreme court before Field, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

D. S. & G. F. RICHARDSON, *for Plaintiff.*

E. R. HOAR and G. D. NOYES, *for Defendant.*

GARDNER, J.

By the act of 1881 (chapter 209), the legislature authorized any insurance company doing business upon the stock and mutual plans to discontinue its stock department, redeem its guaranty capital, and cancel the same in such manner, and upon such terms and conditions as the supreme judicial court may determine and adjudge to be just and equitable. In January, 1882, the Traders and Mechanics'

* Opinion filed, September 10, 1886.

Insurance Company voted to discontinue its stock department, and redeem and cancel its guaranty capital. The plaintiff, by its bill, has applied to this court to determine upon what just and equitable terms and conditions, and in what manner, this may be accomplished.

At the time of the passage of the act of 1854 (chapter 76), authorizing the company to "make insurance against fire and maritime losses otherwise than on the mutual principle," it was the intention of the legislature to empower it to transact business upon the stock principle, in addition to insuring upon the mutual plan, for which the company was chartered in 1848. Rev. St., c. 37, made provision for the way and manner in which insurance companies should carry on business under the stock plan, and also under the mutual plan. The first twenty-three sections relate to stock companies under the name of "insurance companies," and the sections 24-39 relate to "mutual insurance companies." As the corporation, prior to 1854, had been acting as a mutual company, the reference to the Revised Statutes in the act of 1854 was to "all the powers and privileges, and subject to all the duties, liabilities, and restrictions," contained therein relating to stock companies. By the act of 1848, the company was empowered to make insurance upon the mutual plan; and, as such mutual insurance company, it enjoyed all the powers and privileges, and was subject to all the duties and liabilities, which the statutes imposed upon mutual insurance companies. The act of 1854 gave it the additional right to insure "otherwise than on the mutual principle," and imposed upon it the laws governing companies conducting such business. The Rev. St., in c. 39, refer only to stock companies, to mutual companies, and to foreign insurance companies. In those sections relating to stock companies, there was no limit to the number of stockholders. The directors, at such times as their charter or by-laws prescribed, were to make dividends of so much of the profits, and of the interest arising from the capital, as to them appeared advisable. The statements of the profits were to be laid before the stockholders biennially, and in certain contingencies the directors were made liable. It would seem that under the Revised Statute, if the company in transacting business "otherwise than on the mutual principle," were governed by these laws, it was necessary to keep the insurers of each department separate and distinct.

Since its guaranty capital was paid in, the company has kept separate accounts of the business carried on in the stock and mutual departments, and of the receipts and expenditures in each. None of

the assets and earnings of one department have been applied to payment of losses or dividends of the other. The dividends to shareholders have been paid from the earnings of the stock department. None of the earnings of this department have been paid as dividends to the holders of policies issued by the mutual department. The salaries, rents, and other general expenses of the company were divided between and borne by the two departments in proportion to the amount of cash premiums received by them respectively. The tax assessed on account of the guaranty capital was paid by the company, and charged to the stock department. Practically, the company considered that, under a common board of directors, there were two separate and distinct organizations,—one governed by the laws relating to stock companies, and the other by those relating to mutual. Two branches of business were conducted, each independent of the other, with distinct interests, but under a common head.

The by-laws which the company passed in anticipation of raising the guaranty capital were in some respects without authority of law. The article 4, which provided that before the subscription books were opened the directors should determine the rate per centum of the semi-annual dividends, and that the rate thus fixed should not be reduced without the written consent of each and every shareholder, was in direct conflict with Rev. St., c. 37, § 15. The dividends were to be made on profits, and depended on profits, and were to be made as to the directors appeared advisable. The company had no authority to establish them in the arbitrary manner attempted by this by-law.

Article 10 directed the manner in which the funds of the company arising from premiums or assessments, or from any other source, should be appropriated. By this article the funds were to be "appropriated to the payment—First, of expenses; second, to losses by fire; third, to dividends on the guaranty capital, and to make good any reduction in the amount of said capital; and fourth, return premiums and dividends on policies upon the mutual principle as they shall expire." Rev. St., c. 37, § 31, made provision for the appropriation of the funds of mutual companies in a different manner. This article of the by-laws contemplates a distinction between the two departments and no division of their interests or funds.

Soon after the company was organized under its new plan, the act of 1856 (chapter 352) was passed. It provided, by section 36, that "all business and all investments on account of the stock department shall be separately kept," and "the business done on the mutual

principle shall also be kept separate." The plaintiff has complied with the statute, and has not followed the requirement of this article 10 of its by-laws. The dividends, with the exception of a few months, have been paid from the earnings of the stock department, and no occasion has arisen to make good any reduction in the amount of the guaranty capital.

The plaintiff contends that the guaranty capital was practically a loan by the shareholders to the company to enable it to carry on the stock business. Mutual fire insurance companies were required to have a guaranty capital before they could go into operation for the purpose of making insurance. In *Com. vs. Berkshire Ins. Co.* (98 Mass., 25), it was held that such a guaranty capital was a liability; that it was in no proper sense a capital of the company, and that the shares do not, as in stock corporations, represent aliquot fractional interests in the property and franchise; that it was a liability, rather than a part of the assets of the company. It was decided in this case that the corporation, a mutual insurance company, was not liable to a tax on its unredeemed stock, upon the ground that the fund stands as a security for the payment of losses upon policies; that it is tantamount to a debt from the corporation, for the ultimate payment of which provision is constantly made; that the stockholders have no interest in the business of the company beyond the payment of their stipulated dividends, and the maintenance of the sinking fund out of which their stock is eventually to be redeemed. The Court say: "By St. 1864, c. 208, §§1, 5, a certain return is required from and a tax imposed upon 'every corporation having a capital stock divided into shares,' which is computed on 'the excess of the market value of all the stock of each corporation' 'over the value of its real estate and machinery.' The return is also required to be made 'by the stock department of stock and mutual companies.' These are companies which, under one charter, unite two separate branches of business, the stock department doing a stock business, and the mutual department a mutual business, each independent of the other, with distinct interests, and constituting two companies under one corporate organization." The provision in the act to include the stock department of stock and mutual companies, and not the mutual department, afforded a strong presumption that the legislature did not contemplate the taxation of mutual companies upon their guaranty stock.

In the case at bar the company has regularly paid the tax upon its guaranty capital, and charged it to the stock department. It is

to be assumed that this would not have been paid by the company unless it was done in compliance with the provisions of law, especially after the decision in *Com. vs. Berkshire Ins. Co.* in 1867. We think that there is a marked distinction between the guaranty capital referred to in the case cited, and the guaranty capital of a company doing business upon the stock plan, and that the capital of the latter is not a debt, and cannot be construed as a loan to the company, to enable it to carry on the stock business.

The plaintiff contends that, in acquiring the fund, the company made certain promises set forth in the by-laws and votes of the directors; that the risks and liabilities were all upon the side of the corporation, and that the subscribers and shareholders differed in no respect from every lender of money; that there was a written contract between the subscribers to the fund and the capital, and by that contract the rights of the parties thereto must be determined; that by this contract, as shown in the by-laws and votes, the shareholders were to take the dividends upon their stock, as guaranteed to them, without any liability for losses; and that, if the capital should be reduced, it was to be repaired by the mutual department. We have been referred to several statutes passed subsequent to the creation of the guaranty fund, for the purpose of showing that it has been the policy of legislation to keep the stock and mutual departments of companies organized to do business upon both plans distinct from each other, and not to subject mutual policy-holders to any liability for losses in the stock department, or for any impairment of the guaranty capital. The act of 1878 (chapter 141, § 2) provides, "that the mutual policy-holders shall not be entitled to participate in the profits of the stock department, nor shall they be liable to assessment to repair any deficiency in the guaranty capital arising from losses in said department, but said deficiency shall be repaired from the reserve fund of such department, and, if said fund is not sufficient therefor, by the shareholders, in the manner provided by law in the case of joint-stock companies." Although this statute was enacted several years after the plaintiffs commenced doing business upon the stock principle, yet we think it states, in general terms, the law which governed such companies before its passage. The stock department was organized and governed by the laws governing stock companies. The mutual department was, in like manner, subject to the laws governing mutual companies. There was no legal authority for securing the contributors to the guaranty capital by the mutual company. The statutes fixed the

liabilities imposed upon the holders of mutual policies, and the company could not enlarge this liability. The funds of such companies were to be appropriated first to pay the expenses of the corporation, and then to pay the damages which any member may be entitled to recover on his policy, and the directors were authorized to assess such sum as may necessary to pay the same, upon the members, in proportion to the amount of their premiums and deposits severally for seven years. Rev. St., c. 37, § 31. The thirty-ninth section provided that every member, at the expiration of his policy, should have a right to a share of the funds then remaining, after deducting payments of expenses and losses, in proportion to the sums actually paid on account of such policy. If the business of the stock department was not sufficient to authorize dividends to be declared to the stockholders, there was no provision of law by which the members of the mutual department should be assessed for the purpose of making it up to them. The company had no right given to it by statute to pledge its assets to the payment of dividends, or of deficiencies in the capital of the stock department. The statutes which regulated assessments prescribed also the manner of appropriating the funds so raised.

We think that this was not a contract between the subscribers to the guaranty fund and the company. The statute authorized the corporation to form the stock department. This department was to transact a stock business, independent of the mutual department. Its interest was distinct and separate. The laws governing it were those which governed stock companies. The two had one controlling head, but in all other respects they were each as distinct as though they had separate charters. We cannot agree with the plaintiff that the subscribers to the guaranty fund were subject to no risk and no liability. The risk and liability to which they were subject were the same as if they were not connected with the mutual department, but were conducting business upon the stock principle only.

The surplus which the plaintiff now contends should be decreed to the company was derived from the stock department, from the profits of its business conducted with the guaranty capital, and from the gains of its profitable investment. Under section 15 of chapter 37 of the Revised Statutes, the directors of the company, if it had appeared to them advisable, could have distributed the entire surplus among the stockholders as dividends. There is no provision of law by which it can be decreed to the mutual department of the

company. Under section 38 of chapter 37 of the Revised Statutes, to which we have already referred, the mutual department was required by law to account for the accumulations of the stock department to each holder of a mutual policy as it expired. If the proposition contended for by the plaintiff is correct, and if the court should now decree that the mutual department of this company is entitled to any share in these accumulations, all the mutual policyholders during the thirty years that the guaranty capital has been in existence will be entitled to their proportional share in the same.

The shareholders have deposited money, and created the guaranty fund upon their own risk. If the business had been unsuccessful, they would have been the losers. The mutual department, notwithstanding its by-laws and votes, could not have contributed to make good their losses. The surplus stands credited to the stock department, and it seems to us to be just and equitable, that, in winding up the affairs of this department, this surplus, together with the guaranty capital, should be distributed among the shareholders of the fund according to their several shares. Decree accordingly.

SUPREME COURT OF PENNSYLVANIA.

Error to the Court of Common Pleas of Centre County.

LEBANON MUTUAL INS. CO.)

vs.

ERB.*)

A purchased a tannery property at sheriff's sale; before the acknowledgment of the sheriff's deed, A sold to B; by mistake the sheriff returned that he had sold the property to C—who was the mother of B—instead of to B, as he had been requested to return; the error passed unnoticed, B taking possession and insuring the buildings; later the establishment was destroyed by fire. *Held*, the title of B was sufficient to justify his recovery in a suit against the insuring company for the amount of the insurance.

B negotiated for a policy of fire insurance with D, a general insurance agent at Phillipsburg, Penn., who forwarded the application and survey to E, an insurance broker at Boston, Mass., who sent them to the office of the insuring company at Jonestown, Penn., which company executed and forwarded to E a policy containing an acknowledgment of the receipt of the cash premium, which policy was delivered by E to B upon receipt of the premium; seventy days later the premises were destroyed by fire; up to that time E had not paid to the company the premium as received by him; the insuring company could not defend against a recovery upon the policy on the ground that B had failed to comply with a condition of it, which condition required him to pay the premium, otherwise the policy to be void. As notwithstanding neither D nor E were the general agents of the insuring company, yet as the policy was placed in the hands of E for the purpose of delivery, an agency was implied from the nature of the transaction.

A policy of insurance upon a tannery building, with the machinery, boiler, etc., provided "This policy will not cover unoccupied buildings—unless insured as such—and if the premises insured shall be vacated without the consent of this company indorsed hereon, or if the property insured be a manufacturing establishment, or mill running in whole or in part over, or extra time, or running at night, or if the same shall cease to be operated without consent of the company indorsed hereon, this policy shall cease

* Decision rendered, March 15, 1886.—From *Eastern Reporter*.

and determine." The property insured from the time of the insuring till its destruction by fire was occupied in part as a shoemaker shop, the occupant utilized some liquor that was left in the tannery vats, to finish out the tanning of some damaged hides he had found there, and also to tan some new hides he had purchased, and using every week more or less the finishing room to complete this work of tanning. *Held*, that the establishment was both sufficiently occupied and in operation to prevent a determining of the policy because of non-occupancy or non-operation.

A policy of insurance contained the following: "Persons having a claim under this policy shall give immediate notice thereof to the company, and within ten days thereafter render a particular account and proof thereof, signed and sworn to by them, setting forth, etc." * * * "And until such proofs, as above recited, are produced, and examinations and appeals permitted, the loss shall not be payable." Upon destruction of the property, prompt notice of the loss was given to the company insuring, which replied, repudiating responsibility exclusively on collateral grounds, and declining to take the case into consideration. *Held*, that the insuring company had waived its right to proofs of loss, etc.

The facts are set forth in the opinion.

ADAM HOY, for Plaintiff in Error.

As to non-payment of premium, *Schaffer vs. Ins. Co.*, 8 N., 296; *Green vs. Lycoming Ins. Co.*, 10 id., 389. As to waiver, *Wood Fire Ins.*, 693; *Beatty vs. Lycoming Ins. Co.*, 16 S., 17; *Diehl vs. Adams Co. Ins. Co.*, 8 id., 452; *Trask vs. Ins. Co.*, 5 C., 198; *Edwards vs. Ins. Co.*, 25 S., 378; *May Ins.*, 714.

HASTINGS & REEDER and JOHN H. ORVIS, for Defendant in Error.

The insurer cannot be released from his liability to indemnity by reason of any arbitrary provision for forfeiture, having no application to the situation or condition of the property insured: *Grandin vs. Insurance Co.*, 15 W. N. C., 1. As to neglect to pay the premium: *In Marland vs. The Royal Insurance Co.*, 71 Penn. St., 393, this court held: "By giving the policy and receipt to the broker, the company gave him no authority to deliver them, without payment of the premium, and his agreeing to give Marland credit created the contract with the company." The converse of this proposition certainly is that the broker had authority to deliver the policy, upon receiving the premium, and, therefore, a payment of the premium to him would have bound the company: *Lycoming Insurance Co. vs. Ward*, 8 Ins. L. J., 603. As to proofs of loss: In the case of *Trask vs. State Fire and Marine Insurance Co. of Pennsylvania* (5 Casey, 198), this court held, that where a policy required a notice of a loss to be given forthwith, a notice given eleven days after the fire was not a compliance with the condition where no explanation of the delay was offered. In the case of *Edwards vs. Ins. Co.* (75 Penn. St., 380), this court says: "This rule of the company

should receive a reasonable interpretation to mean as requiring due diligence under all the circumstances; that there should be no laches or unreasonable delay, and in this respect *Trask vs. Ins. Co.* seems to have been somewhat harsh." *Farmers' Mutual Ins. Co. vs. Moyer*, 99 Penn. St., 441. As to waiver, *Lycoming Ins. Co. vs. Schreffler*, 6 Wright, 188; *Franklin Ins. Co. vs. Updegraff*, 7 id., 350; *Lycoming Mutual Ins. Co. vs. Schollenberger*, 8 id., 259; *Buckley vs. Garrett*, 11 id., 205; *Farmers' Ins. Co. vs. Taylor*, 23 P. F. S., 342. As to title, *Ins. Co. vs. Robinson*, 5 W. N. C., 24; *Krank vs. Ins. Co.*, 8 id., 53; *Ins. Co. vs. Meckes*, 10 id., 307; *Ins. Co. vs. Dougherty*, 13 id., 270.

CLARK, J.

The Lebanon Mutual Insurance Company, by way of defense against the payment of this loss, allege: first, the title to the property was not in John Erb; second, the premium for the insurance was not paid; third, the premises were vacant or unoccupied at the time of the fire; fourth, the notice of the loss was not given forthwith; and fifth, the proofs of loss were not forwarded in ten days.

The property insured was a tannery, situate at Port Matilda, in Centre County; the title, it is conceded, has been in one Dr. Myer, from whom, on the 25th of April, 1882, it was sold by the sheriff, and purchased by John G. Love. Before the sheriff's return of the sale, Love agreed to sell the property of John Erb, the plaintiff below, but by some blunder, the sheriff returned the property as sold to Elizabeth J. Erb, instead of John Erb, and made the deed to her. John Erb testified that he made the contract with Love for his own benefit, that he paid for it with his own money, and that the letter which the sheriff says he received, directing the deed to be made in the name of his mother, was not written or authorized by him. Elizabeth J. Erb, his mother, testified that she had no claim, and never pretended to have any claim to the property; that she neither paid nor furnished the money to pay for it, and that she never knew that the title was in her name until the fact was disclosed during the trial of the cause. This testimony was wholly uncontradicted, and the learned court correctly instructed the jury that if they believed the facts to be as stated, the title of John Erb, for all the purposes of this case, was sufficient. If the facts alleged are assumed, John Erb was, in equity, the absolute and sole owner of the property; he held in trust for no one, but in his own right, and was entitled, at any time, to a conveyance. The title of his mother was the bare legal title, and was to her utterly and absolutely worthless. It was not essential that John Erb should

have been invested with the legal title if he was the sole beneficial owner of the property: *Fire Ins. Co. vs. Wilgus*, 7 *Norr.*, 107; *Pennsylvania Fire Ins. Co. vs. Dougherty*, 6 *Out.*, 568.

The second ground of defense is equally without merit. One of the conditions of the contract is, that "if the assured shall have neglected to pay the premium," the policy shall be null and void. The original negotiation for this insurance was between John Erb and R. E. Munson & Co., general insurance agents and brokers, at Phillipsburg, Penn. The application and survey were forwarded by R. E. Munson & Co. to Clifford B. Pease, an insurance broker of Boston, Mass., who sent them to the home office of the Lebanon Mutual Insurance Co., at Jonestown, Penn. Neither Munson & Co. nor Pease were the general agents of the defendant company, nor until this time pretended to have any authority to act for or on behalf of the company. On the 5th of June, 1862, the policy in suit, containing an acknowledgment of the receipt of \$30, the cash premium, was by the company executed and forwarded to Clifford B. Pease, the Boston broker, who was thus intrusted with the delivery; although not the agent of the company in any general sense, he thereby became the agent for this particular purpose, upon payment of the premium. The agency is necessarily implied from the nature of the transaction itself; the policy was placed in his hands for the very purpose of delivery, and the delivery, by its express terms, was conditioned upon payment of the premium; it is clear, therefore, that the authority of Pease was limited accordingly. The paper was intrusted to him, as was said in *Marland vs. Royal Ins. Co.* (21 *P. F. S.*, 396), "to be handed over if the premium was paid." The case at bar is readily distinguishable from *Pottsville Co. vs. Minnequa Springs Co.* (4 *Out.*, 137) in this, that it was there stipulated the insurance, whether original or continued, should not be considered as binding, until the actual cash payment of the premium "into the office of the company;" and also, that the premium in fact never reached the person whom the company had authorized to receive it. The company might have retained the policy until the premium was paid, or they might have sent it directly to the insured, with instructions to remit the amount; in either case the contract would have been ineffective until the condition of the policy was complied with; but they chose to send it to Pease, with an acknowledgment of payment, for delivery to the insured, and this act of the company must be taken as an authorization of Pease to receive the money. We find no case involving the question of insurance full and clear upon this point, but the principle is one of

general application, and it cannot be doubted that it is applicable here with like force and effect as in other cases.

Another condition of the policy provided as follows: "This policy will not cover unoccupied buildings—unless insured as such—and if the premises insured shall be vacated without the consent of this company indorsed hereon, or if the property insured be a manufacturing establishment or mill running in whole or in part over or extra time, or running at night, or if the same shall cease to be operated without consent of the company indorsed hereon, this policy shall cease and determine." The buildings, it is conceded, were not unoccupied, and the first part of the clause quoted is, therefore, wholly inapplicable to this case. It is contended, however, as the third ground of defense, that the tannery had ceased to be operated as such, and under the remaining portion of this clause the force of the policy had ceased and determined. The application is not in evidence, and the policy does not disclose that the insurance was upon an establishment in operation; it is upon a tannery building with the machinery, boiler, engine, etc. The property at the time of the fire was occupied and used in precisely the same manner and for the same purpose as when the insurance was effected. Thomas Weston states, however, that he occupied a part of the building as a shoemaker shop up to the time of the fire; he further testified that there was some green bark left, and some liquor in the vats, that would have gone to waste, and he bought some half-dressed stock hides, and tanned and finished them out, and also some damaged hides that had been left in the vats, and that some of them were left, a half dozen or so, at the time of the fire; that he occupied the furnishing room every week, more or less, for the purposes stated. Under these circumstances, the court was clearly right in saying to the jury, that there was no such non-compliance with the above cited condition of the policy as would defeat the plaintiff's recovery.

As to the fourth and fifth grounds of defense little need be said. The eighth condition of the policy provides: "Persons having a claim under this policy shall give immediate notice thereof to the company, and within ten days thereafter render a particular account and proof thereof, signed and sworn to by them, setting forth," etc. "And until such proofs as above required are produced, and examinations and appeals permitted, the loss shall not be payable." The fire occurred Thursday, 10th August, 1882, and the property was totally destroyed. The plaintiff resided in Phillipsburg, some twelve miles distant; hearing of the loss on Monday following, 14th Au ust,

1882, he employed R. E. Munson, Esq., to forward formal notice to the company by mail. To this notice the company replied as follows:—

LEBANON, PA., Aug. 24, 1882.

R. E. MUNSON, Esq.:

DEAR SIR:—Yours of the 14th inst. was sent to me and upon examination I find that the premium on No. 20,934 spe. 1,932 has not been paid at our office, and therefore, no liability could exist. The policy was dated June 5th, '82—being over seventy days ago. We could not under any circumstances ever take the case under consideration.

Respectfully yours,

D. M. KARMANY.

The notice of the loss was certainly given within a reasonable time under the circumstances, and this is all that can be required; and as the company, in their reply, expressly repudiate all responsibility for the loss on other grounds and decline, under any circumstances, even to take the case into consideration, it was certainly unnecessary to furnish any proofs. "Waiver of the proof of loss required in a policy may be inferred from any act of the insurer, evincing a recognition of liability, or a denial of obligation, exclusively for other reasons:" *Pennsylvania Co. vs. Dougherty*, 6 Out., 568; *Inland Co. vs. Stauffer*, 9 Casey, 397; *Lycoming Co. vs. Schollenberger*, 8 Wright, 259; *Home Co. vs. Davis*, 2 Out., 280; *Franklin Co. vs. Flynn et al.*, id., 627. Proofs of loss are but conditions precedent to the bringing of an action, and not of the insurance, and if waived, the action may be brought without any effort at compliance with this requirement.

The judgment is affirmed.

SUPREME COURT OF INDIANA.

Appeal from Pike Circuit Court.

INDIANA INS. CO.

vs.

CAROLINE CAPEHART.*)

A reply setting forth the existence of an agency in the county in which suit is brought and service on such agent is enough to give the court in that county *prima facie* jurisdiction.

Where plaintiff avers performance of conditions regarding proofs in one paragraph and a waiver of the conditions in another, issue is completed by a general denial without the necessity of a special affirmative answer.

Where an adjuster estimates the amount of loss, prepares a written statement in the nature of an examination for claimant to sign, and assures her that there is nothing more to do, this is a waiver of proof of loss, where the policy provides that insured shall at request submit to an examination.

An adjuster authorized to make such an examination has power to waive further proofs thereafter, even when the policy provides that agents have no power to waive its conditions without written indorsement thereon.

MITCHELL, J.

To a complaint founded on a policy of insurance the appellant pleaded in abatement of the action, that it was a domestic corporation, having its principal office in the city of Indianapolis; and that, at the time the suit was commenced, it had no office or agent for the transaction of business in the county of Pike, where the suit was commenced. To this plea the plaintiff below replied that at the time the policy in suit was issued, one John M. Doyle was the duly authorized agent of the appellant in and for the county of Pike, and as such signed and delivered the policy which was the founda-

* Decision rendered, September 22, 1886.

tion of the action; that after the loss occurred, Doyle, who was still the appellant's agent, attempted to negotiate a settlement of its liability under that policy; that after the complaint was filed a summons was duly issued and served on Doyle, "who was the agent of the defendant as aforesaid," and that there was at the time no other officer or agent of the defendant in Pike County. The replication contained an averment that service was also had upon the president of the company in Marion County. The court overruled a demurrer to this reply, and this ruling is urged as a ground for reversal.

Section 309 of the Civil Code provides, in substance, that when a corporation has an office or agency in any county for the transaction of business, any action growing out of the business of such office may be brought in the county where the office or agency is located, and service upon any agent or clerk employed in such office shall be sufficient service upon the principal. Fairly construed, the reply amounts to nothing more than an argumentative denial of the plea in abatement. It shows that at the time the policy was executed, as well as after the loss occurred, and when the summons was issued and served, Doyle was the agent of the appellant in Pike County. This was all that was required to give the circuit court in Pike County jurisdiction of the defendant by its process. We agree with appellant's counsel that an agency must have existed at the time suit was commenced. The reply sufficiently shows that it did exist. Upon a trial of the issue joined on the plea in abatement, the court found for the plaintiff, and gave judgment that the defendant should answer over.

In the policy under which the loss occurred there was a stipulation to the effect that, as soon after a loss as possible, the assured should render a particular statement under oath, giving such information as the assured may have been able to obtain concerning the origin and circumstances of the fire; stating also the title and interest of the assured and others in the property, together with its value. It also provided that the claim should not be due or payable until sixty days after the full completion of all the foregoing requirements contained in the policy. In the first paragraph of the complaint it was averred, generally, that the plaintiff had performed all the conditions of facts which amounted to a waiver of the conditions requiring formal proofs of loss, etc. On motion, this paragraph of the answer was stricken out.

This ruling is presented as a subject for consideration. Furnishing the proofs stipulated for in the policy was a condition precedent

to the plaintiff's right of recovery. The claim for loss was not due until sixty days after such proof was furnished. It was therefore essential to the sufficiency of the complaint that the plaintiff should affirmatively show a performance of the conditions upon which the claim matured, or that a performance had been waived: *Board etc. vs. Hammond*, 83 Ind., 453; *Home Ins. Co. vs. Duke*, 43 Ind., 418. The plaintiff having averred performance in one paragraph, and a waiver of the conditions in the other, the issue in that regard was completed by the general denial, without the necessity of a special affirmative answer. There was, therefore, no error in sustaining the motion to strike out the answer which set up failure to perform the conditions by making proof, etc.

Lastly, it is claimed that the evidence does not sustain the verdict of the jury, and that hence the court erred in overruling appellant's motion for a new trial. The point chiefly contested was whether or not there had been a waiver of the conditions of the policy requiring proofs of loss. Appellant insists—First, that the evidence fails to show a state of facts which in themselves constitute a waiver; Second, that the special agent who waived the proofs of loss had no authority to that end, even conceding that the facts proved constitute a waiver. Concerning the first proposition the plaintiff testified that immediately after the fire she gave notice of the loss to the local agent from whom she had received her policy; that shortly thereafter a Mr. Fulton, who represented himself to be the adjuster of the insurance company, came to the town in which the plaintiff resided, examined duplicate bills of her stock, which she had procured, and made an estimate of her sales, and the amount of stock on hand at the time of the fire. He then prepared a written statement, which she signed and verified, and which Mr. Fulton retained. Thereupon he told her that she had nothing more to do; that the company would settle the loss satisfactorily; and that she would receive a check for the money in a short time. The testimony of Mrs. Capehart, although contradicted to some extent by Mr. Fulton, is corroborated by Mrs. Weldon. The jury evidently accepted her statement as true. Assuming the facts to be as detailed by the plaintiff, the finding that there was a waiver of the stipulation requiring preliminary proofs of loss other than the written statement taken by Mr. Fulton is abundantly sustained. The policy contained a stipulation that the assured should submit to an examination under oath, at the request of the company. This was inserted, doubtless, with the view that the company would thereby be enabled to attain more full and com-

plete proofs concerning the origin and circumstances of any fire which might occur, and the nature and extent of the loss, than would be afforded by the formal proofs which the assured might furnish. Having taken and retained in its possession the examination so provided for, the production of other preliminary proofs was rendered practically useless, and, having notified the plaintiff that nothing further would be required of her, it must be deemed that the facts constituted a waiver: *Insurance Company vs. Fay*, 22 Mich., 467; *Priest vs. Insurance Company*, 3 Allen, 602; *Gans vs. Insurance Company*, 43 Wis., 108; *Badger vs. Insurance Company*, 49 Wis., 396; *Same Case*, 5 N. W. Rep., 848.

The proof does not show what the precise powers of Mr. Fulton were, but it is not denied that he was acting for the company when he took the examination or sworn statement of Mrs. Capehart. He had been employed by the appellant to adjust losses, and having the authority as it is conceded he had, to act upon the subject of taking proof concerning the loss, it must be held that he had power, after making the examination provided for in the policy, to dispense with the other proofs stipulated for therein: *Ætna Insurance Co. vs. Shryer*, 85 Ind., 362, and cases cited.

Counsel for appellant, however, contend that the agent had no power to waive the production of other proofs, because the policy contained on its face the following printed stipulation: "No agent has power to waive any condition of this contract unless by written indorsement thereon." We are not required in this case to enter into an examination of the power of agents to waive conditions contained in insurance contracts, by acts in pais, when such contracts contain stipulations concerning the power of its agents of the character above referred to. It is sufficient to say that limitations of the character above set out are usually held to refer to the power of agents to waive such conditions in the policy as are of the essence of, and enter into and form a part of, the contract of insurance; such are essential to make the contract obligatory and binding between the parties in the first instance, and those upon its continuing force and obligation are dependent, unless a loss occurs. Concerning conditions of that description, and the power of an agent to waive them except in the manner provided, much discussion and some contrariety of opinion may be found: *Blake vs. Exchange Mut. Ins. Co.*, 12 Gray, 265; *Viele vs. Germania Insurance Co.*, 26 Iowa, 9; *Palmer vs. Ins.*, 44 Wis., 201; *Insurance Company vs. Staats*, 102 Pa. St., 529; *Insurance Co. vs. Weiss*, 106 Pa. St., 20.

Stipulations which do not properly amount to conditions upon which the inception or obligation of the contract depends and which merely require that something should be done by the assured in the way of furnishing proofs or information to the insurer regarding the circumstances and origin of the fire, the nature and extent of the loss may be and are waived when other proofs or information in respect to the same matter is accepted or received without objection by an agent of the company who is duly authorized to act with reference to that subject: *Franklin Fire Ins. Co. vs. Chicago Ice Co.*, 36, Md., 102; Same case, 11 Amer. Report, 468; *May Ins.*, par. 511.

The purpose of requiring proofs of loss by the assured having been subserved in a manner provided for in the policy, the agent of the company charged with the duty of inquiring concerning that very matter having made inquiry, and having induced the insured to believe that no other proof would be required, the company must now be held estopped to say that such agent was not authorized to dispense with the formal proofs stipulated for in the policy by accepting for the company other proofs in its stead.

There was no error. Judgment is affirmed with costs.

Judgment affirmed.

SUPREME COURT OF ILLINOIS.

PHOENIX INSURANCE CO.)

vs.

JOHN B. LA POINTE.*)

Where the question in dispute was the agent's knowledge of an incumbrance, a report sent to the company representing the property as unencumbered, but made not by the agent with whom insured negotiated, but by his partner from information derived from him or from some other source, is not admissible as evidence.

Evidence as to other property destroyed not covered by insurance was admissible to rebut the theory that insured did not endeavor to save property and was in any other case immaterial.

It is not error to refuse instruction that the interest of a particular witness should be considered as affecting his credibility.

Refusal to give an instruction will only justify reversal when it appears that the result of the trial might have been materially affected.

ROBERT RAY and JOHN S. MILLER, attorneys *for Appellant*.

MESSRS. ABBOTT, OLIVER & SHOWALTER, attorneys *for Appellee*.

SHOPE, J.

At the time of issuing the policy of insurance sued upon there was a chattel mortgage upon the property insured to secure \$1,000, previously given by appellee to Lewis Hartman, agent, and which remained a lien thereon at the time of the loss. No mention is made of this mortgage in the policy and it was insisted that the policy was therefore void. To this it was replied that before the acceptance of the premium by appellant company or issuing the policy, the company had notice of the incumbrance. There was sharp conflict in the evidence as to such notice, the witness for appellee

* Opinion filed, October 5, 1886.

testifying that at the time of the application for insurance by appellee, and the agreement to insure, appellee told the agent of appellant of the mortgage fully, and the agent replied it would make no difference in the company taking the risk. The agents of the company deny this, and testify that the first knowledge they had of any incumbrance on the property was after the fire. There is no contention that the company is not liable if the agent had such notice, and it will therefore be unnecessary to discuss that branch of the case.

It appears that appellant company requires its agents to make reports to its home office of all matters material to the risk upon which the company acts in determining upon its acceptance or rejection of the insurance. At the trial below, as part of the *res gestæ* as it is contended, appellant company offered in evidence a written report by the agents of this risk made to the company, in which it is represented that the property proposed to be insured was unincumbered, which on objection was excluded by the court. This ruling is assigned for error. It is proved and not denied that the agreement to insure was made "about the last of May," and the report mentioned was mailed to the company on the 18th day of June, but it does not appear when it was, in fact, made out by the agent. It is not, however, pretended that it was made at the time of the agreement to insure, or in appellee's presence, or that he had any knowledge of it whatever. It is shown by the testimony of the agent, Smith, that he made the report, and that he at no time had any conversation with appellee in reference to the insurance until the night of the fire. It is claimed by both Smith and Wilder, appellant's agents, that Wilder alone arranged with appellee for the insurance. Thus it will be seen, not only that this report was not made as part of the transaction with appellee relating to the insurance, but must have been made by Smith from information derived from Wilder or some other source. It was no part of the *res gestæ* and was properly excluded. The plaintiff was permitted, against the objection of defendant, to testify what property other than that covered by the policy was in his building and destroyed. This is also assigned for error. There is no pretense that any such property was included by the jury in their assessment of damages. The evidence shows without contradiction that property covered by the policy in excess of \$1,000 was consumed. If the evidence objected to tended to rebut the theory of defense, that the insured property was lost by reason of the failure of appellee to use his best endeavor

to save the same, it was clearly admissible; but if it did not so tend, it was immaterial, and appellant was not prejudiced thereby.

The next point urged, that appellee did not give notice and make proof of loss as required by the terms and condition of the policy, presents a question of fact with which we can have no concern. The question was fairly submitted to the jury by the trial court.

It is next urged the court erred in refusing appellant's fourth instruction, which is as follows:—

An instruction covering the question of the burden of proof was given.

It is always competent to show the interest of the witness "as affecting his credibility," and such interest in the result of the litigation is a proper element for the consideration of the jury.

The practice of singling out witnesses in an instruction of this character, when the credibility of others testifying in the case may also be affected by their interests, has frequently been criticised by the courts.

In *Ammerman vs. Teeter* (49 Ill., 402), cited by counsel for appellant, in speaking of an instruction naming the witness, the court says: "We must presume that the judge trying the case would not give such an instruction unless the manner of the witness justified and called for it." Then the instruction related to the conduct of the witness in court as well as to his interest.

We are not called upon to determine whether the giving of this instruction would have been erroneous; it often happens that the giving of an instruction would not constitute reversible error where the refusal of such instruction would not be improper.

There is nothing apparent here calling for or justifying the court in departing from the correct practice.

The interest of the witness named in the instruction, it is conceded, was proper for the consideration of the jury; but if their testimony is believed, it might well be that the agents of the company would be responsible to the company, and at least they would be greatly interested in maintaining the correctness of their report to the company upon the faith of which the company had acted in insuring appellee's property. The instruction under consideration, if given, would give undue prominence to facts alleged as operating to discredit appellee's witnesses, while it ignored corresponding causes alleged to affect the credibility of witnesses for appellant.

When there is a conflict in the evidence so that the issue must be determined from a consideration of the credibility of the witnesses,

the instructions on that branch of the case should be so framed as to fairly present the rules of law applicable, and leave it to the jury to apply them impartially under the evidence. We are of opinion the instruction was properly refused.

Again, it has been repeatedly held by this court that to justify a reversal because of the refusal of the lower court to give an instruction, it must appear that if it had been given the result of the trial might have been materially affected thereby. We have with this principle in view, carefully examined the evidence in this record, and are satisfied that substantial justice has been done. That the loss was an honest one without the fault of appellee, is not seriously disputed; and we cannot see how, upon any just consideration of the evidence, a different result could have been reached. The refusal of the instruction for this reason also furnishes no ground for reversal; see *Chicago & E. Ill. Ry. Co. vs. Rung*, 104 Ill, 641; *Chicago & W. I. Ry. Co. vs. Dooling*, 95 Ill, 203; *Hubner vs. Feige*, 90 Ill, 208. The judgment of the appellate court is affirmed.

SUPREME COURT OF MICHIGAN.

PANGBORN

vs.

CONTINENTAL INS. CO.*

The insured represented in the application that he was owner in fee simple.

Held, That buildings annexed to freehold are real estate, and the representation was in effect that the title to the land was in fee.

Held, That evidence was admissible to show the deed, though executed, had never been delivered, but was deposited for delivery conditional upon satisfactory care of his father and mother, to be determined after their death.

When the insured failed to produce a receipt given for the deed from the party holding it, it was competent for the defense to show its contents by parol.

WINSOR & SNOVER, *for Plaintiff*.

F. A. BAKER (CHAS. L. HALL of Counsel), *for Defendant*.

CHAMPLIN, J.

The plaintiff declared upon a policy of insurance issued by the defendant. The defense was the general issue, and notice that in the application upon which the policy was issued the plaintiff represented that he was the owner in fee-simple of the property on which the buildings insured were situated, and that they were only incumbered to the amount of \$500, whereas, in truth and in fact, said plaintiff did not own the property in fee-simple, and had no ownership of said property, and the same was incumbered to the amount of \$700 and upwards, as was well known by plaintiff.

Upon the trial no question was made respecting the loss by fire of the subjects insured, and no contest was made over their value. The issue was confined to a very narrow compass, and related solely to that raised by the notice. The plaintiff introduced deeds showing a chain of title from the State of Michigan to the plaintiff of the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 20, in township 16 N., range 13 E., upon which the buildings and property insured were situated.

* Decision rendered, October 7, 1886.

To show the representations made, the defendant introduced the application upon which the policy was issued. The fifth, sixth, and eighth questions and answers were as follows: "(5) Title. Have you the fee-simple title? Yes. If not, what kind of a title have you? (6) Incumbrance. Is the property incumbered? Yes. If so, in what amount? \$500. When due? 1883." "(8) Cash value of the land and buildings, \$4,500. No. of acres? 160. How long have you owned the premises? Five years."

Buildings permanently annexed to the freehold are regarded as real estate, and the representations contained in the application unquestionably constituted a warranty that plaintiff was the owner in fee-simple of the land upon which the building insured was situated. If he did have the title in fee-simple to such land, there was no false representation with respect to such ownership. If the representation of quantity was relied upon as a warranty, and its falsity as a defense, defendant should have set it up in its notice. Under the rules established by this court, the defendant must confine himself to the fraud or falsehood alleged in his notice. It was therefore immaterial whether plaintiff was or was not the owner of other land than the forty acres upon which the building insured stood.

After the plaintiff had introduced evidence tending to prove the execution and delivery of the deed from Barbara Pangborn to him, the defendant, to rebut such evidence, and prove the fact set up in its notice, offered evidence tending to prove, as its counsel claimed, that such deed had never been delivered, or ever had any legal effect, by offering to prove that this deed was placed or deposited in the hands of Henry Pangborn, to be held and kept by him during the life of Barbara Pangborn and Mr. Pangborn, the father and mother of plaintiff, and after their death to be delivered to plaintiff, provided plaintiff should have fed, clothed, and cared for his mother and father to the time of their death in a manner satisfactory to Henry Pangborn. Barbara Pangborn and her husband were living with plaintiff at the time the insurance was effected, and at the time of the loss. It was competent for the defendant to show, if he could, that Barbara Pangborn delivered the deed to Henry Pangborn to hold until performance by plaintiff of some condition, and to be delivered to him. If the defendant could establish this fact, and show the condition had not been performed, the defense of want of title in fee-simple would be established. It was therefore proper for counsel for defendant to inquire of plaintiff, on cross-

examination, what the deed was put into his brother's hands for. It was proper cross-examination.

The evidence showed that when the adjuster called upon the plaintiff to adjust the loss he requested to be shown the deed from plaintiff's mother to him, and that plaintiff told the adjuster that it was held by his brother, and that he held his brother's receipt therefor, which he showed to the adjuster, and he made a written memorandum of its contents. Notice had been served upon plaintiff's counsel to produce this paper, and, during the cross-examination of plaintiff, defendant's counsel called for the production of the paper. Counsel for plaintiff did not produce such paper, and disclaimed all knowledge of any such paper. Counsel for defendant then asked this question of the plaintiff: "Now, Mr. Pangborn, did you on that occasion show to Mr. Willard a paper signed by Barbara Pangborn, your mother, bearing date the fifteenth day of March, 1882, the same as this deed, providing that Henry Pangborn was to hold this deed, and it was to be delivered to you at the death of Barbara Pangborn, your mother, and her husband, provided you supported and cared for them during their natural lives according to the satisfaction of Henry Pangborn?" The question was objected to by plaintiff's counsel as not proper cross-examination. The objection was sustained by the court, and the question was excluded. This ruling was erroneous, within repeated decisions of this court: *Chandler vs. Allison*, 10 Mich., 460; *Dann vs. Cudney*, 13 Mich., 239; *Detroit & M. R. Co. vs. Van Steinburg*, 17 Mich., 99; *Stearns vs. Vincent*, 50 Mich., 221; *s. c.*, 15 N. W. Rep., 86.

The defendant attempted to show by parol testimony the contents of the paper held by the plaintiff from his brother concerning his custody of the deed, and the condition upon which he held it, but such testimony was excluded as being incompetent. The original was admitted to have been in the possession of the plaintiff, and we think the notice was sufficiently certain to call upon the plaintiff to produce the paper, and upon his neglect or refusal to do so, it was competent to show its contents by parol. The controversy was over the delivery of the deed. This involved the intention of the grantor, and all testimony bearing upon that question should have been admitted. For these errors there must be a new trial.

We discover no error upon the question of incumbrances. It was properly submitted to the jury under the evidence.

The judgment will be reversed, with costs, and a new trial ordered. The other justices concurred.

SUPREME COURT OF MICHIGAN.

ROBINSON AND ANOTHER

vs.

FIRE ASS'N OF PHILADELPHIA.*

The policy provided that it should be void, unless consent were obtained in writing, in case "the insured should have or shall hereafter obtain any policy or agreement for insurance, whether valid or not.

Held, That the policy was avoided by taking out another which was obtained and shewn to the agent, without objection by the latter, after failing to negotiate with him for the additional insurance at a satisfactory rate.

WALTER S. POWERS and DICKINSON, THURBER & HOSMER, *for Plaintiffs*.
NORRIS & UEL, *for Defendant*.

SHERWOOD, J.

This is an action on a policy of insurance issued by the defendant to Rachel A. Kanago, and assigned, after loss, to the plaintiffs. The declaration counted on the policy and alleged an assignment of the same to the plaintiffs after loss. The plea was the general issue, with the following notice given thereunder: "You will please take notice that on the trial of said cause the above-named defendant will give in evidence, and insist in its defense, that, at the time of the alleged destruction and damage of the property claimed in plaintiffs' declaration to have been destroyed and damaged by fire, as in said declaration set forth, none of said claimed to be insured property was so destroyed, as alleged in said declaration; that said property had, prior to the said fire reaching it, been all removed to a place of safety, and was not in any wise damaged or destroyed, of which

* Decision rendered, October 14, 1886.

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fact the assured and said plaintiffs had notice; that said policy of insurance declared upon contained the following condition: 'Any fraud or attempt at fraud, or any misrepresentation in any statement touching the loss, or any false swearing on the part of the assured or his agent, in any examination, or in the proofs of loss, or otherwise, shall cause a forfeiture of all claim on this association, under this policy; and in such case this association shall have the right, at any time, to require the same to be delivered up to be canceled;' that the said assured, and the said plaintiffs, in making claim against this defendant, and in making proofs of loss to this defendant, violated the said condition." The cause was tried in the Barry circuit, before Judge Hooker, by jury, and a verdict for the defendant was directed by the court. The plaintiffs bring error.

The policy issued by the defendant contained the following clause, among others: "This policy shall become void, unless consent in writing is indorsed by the association hereon, in each of the following instances, namely: (1) If the insured shall have, or shall hereafter obtain, any policy or agreement for insurance, whether valid or not, on the property above mentioned, or any part thereof." The property insured in this case was upon a stock of boots and shoes. About ten month after the insurance was obtained in the defendant's company, Mrs. Kanago took out a policy for \$1,000 on the same property in Royal Insurance Company of Liverpool, and it is claimed by defendant this was done without any consent given by the defendant; that this was the situation when the loss occurred, and that by reason thereof the policy of defendant was rendered void, and no action can be maintained thereon. On the part of the plaintiffs it is claimed that what occurred between the defendant's agent and Mrs. Kanago, after the policy was issued, amounted to a waiver by the company of the necessity for its written consent to obtain the additional security.

Harry A. Durkee was the agent of the company at Nashville, the village where the property was located, and the place where the insurance was taken. This is what occurred after the policy was issued to Mrs. Kanago. Her husband, acting as her agent, sought to obtain additional insurance upon the stock of goods, and, with that object in view, called on Mr. Durkee, who asked Mr. Kanago a higher per cent for the additional insurance than others did, and Mr. Kanago says in his testimony: "And I told him I thought I could do better, as other parties in the same row of buildings were getting insurance a great deal cheaper than he was offering. I

think 2 or $2\frac{1}{2}$ per cent was what he wanted, while others were paying $1\frac{1}{2}$, I believe. After this conversation in the office of Durkee, I went to Webster & Mills, and procured a Royal Insurance Company policy, that I now have. Durkee came into my store, and asked for Mr. Leidy, and while he was in there I showed him the Royal policy. He had it in his hands, opened it and looked at it, and laid it down again. Mr. Riggle was present. Question. Upon that occasion, what did Mr. Durkee say about additional insurance, if anything? Answer. He did not say anything to me in particular, any more than he read the policy over—looked it over—and dropped it down upon the desk again, and opened it out, and read the writing. Don't know as he read any of the printing. Q. Did he then and there raise any objection to it? A. No, sir."

It is upon this testimony of Mr. Kanago that the plaintiffs claim the assent in writing to subsequent insurers was waived by the company. The circuit judge held it was not sufficient, and did not even tend to prove a waiver of the required written assent, and so instructed the jury. We think he was correct, and that the judgment should be affirmed.

Taking above testimony in the strongest manner against the company, and it shows no more than knowledge that Mrs. Kanago desired cheaper insurance than the defendant was willing to give, and that she subsequently obtained it. This is no evidence, alone, of consent, or of waiver of written notice of consent, by the defendant that such second insurance might be effected, and the policy issued by defendant become void as soon as the contract for insurance was perfected in the Royal Insurance Company of London. *Western Mass. Ins. Co. vs. Riker*, 10 Mich., 279; *Security Ins. Co. vs. Fay*, 22 Mich., 467; *New York Cent. Ins. Co. vs. Watson*, 23 Mich., 489; *Burt vs. People's Fire Ins. Co.*, 2 Gray, 397; *Van Alstyne vs. Aetna Ins. Co.*, 14 Hun, 360; *Pitney vs. Glens Falls Ins. Co.*, 65 N. Y., 6; *Shurtleff vs. Phoenix Ins. Co.*, 57 Me., 137; *Illinois Mut. Fire Ins. Co. vs. Fix*, 53 Ill., 151; *Mussey vs. Atlas Mut. Ins. Co.*, 14 N. Y., 79; *Illinois Mas. Ben. Soc. vs. Baldwin*, 86 Ill., 479; *Allemania Fire Ins. Co. vs. Hurd*, 37 Mich., 11; *West Chester Ins. Co. vs. Earle*, 33 Mich., 143; *Kitchen vs. Hartford Ins. Co.*, 23 N. W. Rep., 616; *Insurance Co. vs. Kittle*, 39 Mich., 51; *Carpenter vs. Continental Ins. Co.*, 28 N. W. Rep., 749.

We think the plaintiffs' motion to strike out the testimony given by the defendant, showing a breach of one of the conditions contained in the contract of insurance sued upon, made at the close of

the trial, was correctly overruled. The testimony was not objected to when offered; and, if it was inadmissible under the general issue, as claimed, a motion on the part of the defendant would have been entertained and allowed by the circuit court upon the trial amending the defendant's notice under his plea; thus removing all grounds of objection.

We do not think motions of this kind should be allowed to prevail when the testimony offered is competent, and no objection is made thereto at the time it is given. The other justices concurred.

SUPREME COURT OF MICHIGAN.

HASLINGER

vs.

LONG ISLAND INS. CO.*

Where the power of arbitrators is restricted to a finding as to the amount of loss, and not extended to the validity of the contract or other questions, a finding of the court below which seems from the record that the submission to arbitration was a waiver of all other questions in controversy, is sufficient ground for a new trial.

ALBERT J. CHAPMAN, *for Plaintiff.*

BARBOUR & REXFORD, *for Defendant and Appellant.*

CAMPBELL, C. J.

This was an action of debt upon an award made by two persons chosen to determine the amount of loss under a fire policy. The court made a special finding of facts, which does not set out the terms of the policy of insurance, or any copy of it; but, after showing payment of premium and damage by fire, states a reference by agreement to appraisers, and their estimate of damages at \$205.50. There is a finding that the policy was issued, and all the subsequent steps taken, by one Early, the terms of whose authority by commission are expressly named, and do not expressly include a submission to appraisers or arbitrators; but that the insured person did not know what his authority was; that, after the fire Early sent for the insured (Mr. Sears) to settle the loss, saying there was no need of lawyers; that due proof of loss was made out and sent with the award to defendant, and that defendant denied liability. Certain

* Decision rendered, June 24, 1886.

conclusions of law were made, and judgment given for the sum awarded. The sum appears to have been duly assigned to plaintiff.

Defendant asked such an amendment to the finding as would show the terms of the submission and award, and should also show the terms of the policy, and, showing further, the circumstances under which Early made the submission. This was refused. Errors are assigned upon rulings on testimony, and also upon the refusal of the court to make a further finding, as well as upon the insufficiency of the finding itself. There is much reason to think that the defendant is liable, and we see no reason to doubt the admissibility of the testimony objected to, which included the proofs of loss, the submission and award. We also think there was testimony from which the court might properly find that the submission was fully authorized. Indeed, under the policy, which is in evidence, we do not see much reason for raising any such question. But we are compelled to hold that, by an evident oversight, the finding has been left imperfect. It does not identify either the policy, the submission, or the award, which all appear to have been in evidence, and to have been annexed to the bill of exceptions. It fails to find such a submission as appears to have been actually made, and the failure is not a mere formal defect. Under the language of the policy, which authorizes a submission, it is to be confined to "the amount of loss or damage, but shall not decide as to the validity of the contract, or any other question, except the amount of such loss or damage." This would leave on plaintiff the burden of proving his insurance and other facts necessary to a recovery. The submission actually made is in substantial harmony with the policy. This finding seems to have gone upon the theory that by the submission, all other questions concerning the right of recovery had been made unimportant, and it omits such a description of the submission as was necessary to show its real character; and it, therefore, in describing it and the award, fails to truly present what was its effect and bearing. It is evident from the finding itself that some questions were raised as to objections which, if not waived, might have led to further consideration. The award itself was not an adjudication of debt, standing alone, but the finding practically so made it.

While the case, as presented by the bill of exceptions, indicates that the court below may very probably have based its conclusions upon all of the facts necessary to a result, yet it is also evident that, had the finding been more full, it would have presented some issues of importance which are not now conclusively determined by it.

Taken as it stands, the terms and conditions of the policy receive no notice at all, while, from the conclusions of law, it appears that some of them were in the mind of the court, although not pointed out by any reference.

For the insufficiency of the finding, it must be held that there has been a mistrial, and the judgment must be set aside, and the case remanded for a new trial, without costs of this court, and with costs below to abide the event. The other justices concurred.

SUPREME COURT OF PENNSYLVANIA.

Error to Court of Common Pleas No. 3, of Philadelphia County.

CONROW

vs.

AMERICAN LIFE INS. CO.*)

The plaintiff claimed that the policy he received was different from that contracted for, and sought to recover damages for refusal to deliver the policy contracted for.

Held, That the omission from the evidence of the policy actually received and the application and the lack of proof that it was not accepted, were fatal to the claim.

Held, That a written contract cannot be reformed for fraud or mistake without proof of what was fraudulently omitted or inserted. Mere oral evidence will not suffice.

WILLIAM HENRY SMITH, Esq., *for Plaintiff in Error.*

HENRY HAZELHURST and ISAAC HAZELHURST, Esqs., *for Defendant in Error.*

TRUNKY, J.

The plaintiff gave in evidence policy No. 40,170, full paid, for the sum of \$2,250, payable to Mary T. Conrow, within sixty days after the death of the insured. Also, a receipt signed by himself and Mary T. Conrow, as follows: "Ins. \$2,000, \$96, cash \$490, Moorestown, N. J., April 29th, 1878. In consideration of \$586, to us in hand paid by the American Life Insurance Company (the receipt whereof is hereby acknowledged), we hereby surrender to said company policy No. 40,170, upon the life of Darling Conrow, for cancellation."

* Decision rendered, April 20, 1885.

On the date of that receipt he signed an application for a policy, and within a few days thereafter received a policy for \$2,000, annual premium \$96. He did not offer the application and policy in evidence. In 1879 he paid the premium. When it was about time to make the next annual payment he went to the office of the defendant, told the secretary the policy was not such as he was to have, that he was to have one to be paid in fifteen years, wanted one so payable, which the secretary refused to give; then asked the secretary what he would give for the policy, and was answered, not one cent, whereupon he said he would pay no more premiums, and left. The plaintiff testified to an agreement between himself and Harper, that the defendant was to pay \$490, give him a new policy for \$2,000, payable in fifteen years, and in the event of his death any time before, pay the same to his wife or children, to pay annual dividends which would amount to more than the interest, and receipt the first premium of \$96, in consideration whereof he surrendered said policy No. 40,170. Such was the plaintiff's proof, and a mere statement thereof vindicates the judgment of the learned judge of the common pleas.

It is not claimed that the plaintiff rescinded the contract upon discovery of a fraud perpetrated on him in the making of it. If there were such fraud, and a rescission of the contract, he would be entitled to recover the value of the policy he surrendered. There is no pretense of evidence of a rescission; no money was returned or tendered, nor demand made for the surrendered policy.

The plaintiff claims "there was very little evidence about the policy they gave him, that he testified it was not what they sold and promised to send him, and upon discovering the trick he carried it to the defendants' office and called for the secretary, who refused to give him the kind of policy he demanded." He seeks to recover damages for non-delivery of a policy for \$2,000 endowment insurance. Although he made a written application, which was present and identified by him at the trial, and still retained possession of the policy for \$2,000, he rested without giving either in evidence. The application and policy and receipt of April 29th, 1878, constituted written evidence of an entire transaction, or complete contract. How could the jury have determined that the policy was not within the terms of the contract? In absence of evidence of its contents, how could they infer that the policy which the plaintiff had accepted and held two years, without objection, differed from the contract as shown by his oral testimony? A written contract cannot be

reformed for fraud or mistake without evidence of what was fraudulently or mistakenly inserted or omitted. Where the plaintiff shows that his contract was in writing, and avers that a policy was delivered and apparently accepted as a part of the contract, he cannot recover upon mere oral testimony that he contracted for a different kind of policy. He must prove the contents of the policy he received, and wherein it differs from that he contracted for, and that he had not actually accepted the one that was delivered and in his possession.

Judgment affirmed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

PHOENIX INSURANCE COMPANY }

vs. }

CHARLES F. FRISSELL.*

An agent of an insurance company who for six days fails to notify the assured that his company refuses to take a risk, does not use due diligence, and is liable to said company for a loss occasioned thereby.

This was a action against the defendant, an insurance agent of the plaintiff, to recover damages which the plaintiff was obliged to pay on a policy of insurance issued by the defendant's agent, by reason of the agent's negligence to notify the assured that the plaintiff declined to take the risk. The necessary facts appear in the opinion. A verdict was returned for the plaintiff, and the defendant excepted.

GIDEON WELLS, *for Plaintiff.*

CHARLES BURRIE, *for the Defendant.*

MORTON, C. J.

The plaintiff is a corporation established in the State of Connecticut.

The defendant was its agent at Burlington, in the State of Vermont. He issued a policy of insurance to the Shepard & Morse Lumber Company, upon its "dry-house," in Burlington, and on the tenth day of February, 1885, notified the plaintiff of it. The plaintiff on the same day notified the defendant, by a letter, that it declined

* Opinion filed, October 22, 1886.

to take the risk, and directed him to cancel the policy. This letter was received by the defendant on the eleventh day of February.

The policy contained the provision that "It may also be terminated at any time, at the option of this company, on giving written or verbal notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy."

Upon receiving the letter of the plaintiffs, it was the duty of the defendant to use reasonable diligence in notifying the insured and canceling the policy. Whether he used this diligence was a mixed question of law and fact. There was evidence tending to show that the defendant could have notified the officers of the insured corporation within half an hour after receiving the letter from the plaintiff; that he being also the agent of the *Ætna* Insurance Company, on said eleventh day of February wrote a policy in that company which he intended to take the place of the policy of the plaintiff, but did not notify the insured of the *Ætna* policy or of the cancellation of the plaintiff's policy, and took no steps to effect such cancellation, until after the "dry-house" was burned, which occurred on the sixteenth day of said February. It was competent for the justice of the superior court, who tried the case without a jury, to find from this evidence that the defendant did not exercise that diligence which his duty to the plaintiff required, and we cannot say as a matter of law, that he erred in refusing to rule, as the defendant requested, that the plaintiff could not recover.

The defendant also asked the court to rule that "Inasmuch as by the terms of the policy the plaintiff had sixty days after proof of loss in which to pay the amount due thereunder, the action was prematurely brought."

The proof of loss was made February 22, 1885. It was admitted that the loss was fairly adjusted and that the plaintiff was liable under its policy for the full amount paid by it. At the time the action was brought, the plaintiff had sustained damage by the defendant's negligence, because it had been by his negligence liable to pay the amount of its loss. A cause of action had thus accrued. We are of the opinion, that the court rightly refused the ruling requested by the defendant. It is no defense that the company paid the loss within sixty days of the proof. The loss being adjusted, it had the right to pay it within the sixty days if it chose to do so; the provision of the policy that a loss should not be payable until sixty days after the proof being a provision in favor of the company, which it could waive. The defendant was in no way injured by such

a waiver. The offer of the defendant to testify that "orders generally from the companies are to cancel the policy as soon as convenient, and that it is generally understood that an agent has from five to ten days in which to cancel a policy," was rightly excluded by the court.

It does not amount to an offer to show a general usage which could affect the plaintiff, even if proof of such a usage would be admissible. Exceptions overruled.

SUPREME COURT OF PENNSYLVANIA.

ELKINS

vs.

SUSQUEHANNA MUTUAL FIRE INS. CO.* }

In this case the agent of an insurance company delivered the policy, charged himself with the premium in the day book, and charged the premium also to the agent of the insured, with whom he had a running account.

Held, That in view of the evidence as to the course of business between the company and its agent, this evidence should have been submitted to the jury upon the question whether the company did not waive the provision in the policy that it should not be liable until the premium be actually paid.

CHAS. B. McMICHAEL and ALEX. P. COLESBERRY, Esqs., for Plaintiff
in Error.

JAMES C. SELLERS, Esq., for Defendants in Error.

CLARK, J.

The policy of fire insurance upon which this suit is brought contained the following express stipulation: "This company shall not be liable by virtue of this policy, or any renewal thereof, until the premium therefor be actually paid," etc.

It was competent, however, for the company to waive this provision; they were not bound to adhere to this clause of their contract, inserted solely for their protection, if they chose to dispense with it. Whether or not the company did dispense with it, was, perhaps, the question in the cause. Whether there was evidence from which that fact might fairly be inferred, is the question for consideration here.

That Robert Crane, at the time the policy was applied for, was the defendant's agent, for some purpose, is plain. What power he pos-

Decision rendered, Oct. 6, 1886.—From *Legal Intelligencer*.

assessed to bind his principal with reference to the payment of the premium, must be ascertained from an examination of the testimony. The court below having entered a compulsory nonsuit, the plaintiff's evidence must be taken as true, not only the facts directly established, but every reasonable inference therefrom.

Crane, having been called as a witness, testified on this branch of the case as follows: "I was, in December, 1880, the agent of the Susquehanna Mutual Insurance Company for certain purposes, to receive applications, forward them to the company, and, if approved, they to write the policies, and send me the policies. I to make record of the policies, and to deliver to the assured or his agent. I collected the premiums and remitted the same to the company, less my commissions. I received this policy from the company direct by mail, and delivered it to Thomas J. Lancaster. I had a running account with Mr. Lancaster. In March, the day before the fire at the Elkins property, he paid me \$100 on account.

Upon cross-examination he said: "I commenced business with the Susquehanna Insurance Company April 20th, 1880. My appointment was in writing. I did not have a certificate under seal. I got permission from them to send them business, and it resulted in an agency for certain purposes. I sent them business as agent, and signed my name as such in communications to them. There were a good many other details. I did not always sign my name as Robert Crane, Manager. Ninety-nine times out of one hundred I signed as agent."

Being recalled and examined by trial judge, Crane testified: "I charged myself in the day-book with the premiums. I was responsible for the premiums. They looked to me for the payment of the premium or the return of the policy. I often advanced the money to the company, I was obligated to pay the company the premium after I had received and delivered the policy, as agent of the company."

From this it appears that Crane had power, on receipt of a policy, to deliver it to the assured; or to his agent, and to collect the premiums. The company looked to Crane, either for a return of the policy, or for the premium. Upon delivery of the policy he was obligated to pay the premium as for his own debt. He therefore kept an account with the company and charged himself with the premiums as the policies were delivered, and took credit with any remittances he might make. Now, if it be true, that an arrangement to this effect existed between the company and Crane, and that

may be fairly inferred from the evidence, the arrangement would seem to indicate that the company was content to accept the responsibility of their own agent, for such sums as he might receive or otherwise provide for on delivery of the policies, and to substitute the personal liability of the agent in the place of the security, which the suspension clause in their contract afforded. This implication is greatly strengthened by the course of business which the agent pursued in the conduct of the company's business. He delivered such policies as he chose and charged the premiums in an account which he kept. He had a running account with Lancaster, and the premiums for this insurance were charged up to Lancaster when the policy in suit was delivered to him. The effect of such a course of business, as respects Crane, certainly was to substitute the liability of Lancaster for that of the assured. And Lancaster says he usually rendered bills to Mr. Elkins once in three months.

In view of the course of business pursued by this company with Crane, and by this agent in the consummation of their contracts, we think the implication might fairly arise, that any absolute requirement of the policy, as to the actual prepayment of the premiums, had been dispensed with, and that the obligation of the agent to pay the premium was in effect the payment of it by the insured. If Crane had advanced the money to the company, and delivered the policy, no one can doubt that it would have taken immediate effect, and in what respect can there be any difference, in principle, if Crane, with the company's consent, assumed the payment, thus substituting his personal liability in the place of the money? Lancaster became debtor to Crane, and Crane to the company, and this, in view of the course of business pursued by the company, would, as between the insurer and the insured, we think, be equivalent to actual payment.

We think there was enough in this case to require its submission to a jury.

The judgment is therefore reversed and a venire facias de novo awarded.

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No. 2

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1886-87.

Appeal from Montgomery Circuit Court.

COMMERCIAL FIRE INS. CO.)

vs.)

CAPITAL CITY INS. CO.*)

To sustain an action on a policy of insurance against fire, there must have been, when the policy was taken out, and when the loss occurred, such right or ownership as amounts to an insurable interest, and the plaintiff must show that he is entitled to assert that interest; but under the forms

* Decision rendered, December 10, 1886.

VOL. XVI.—8.

of pleading prescribed and authorized by the code (form No. 16, p. 704, § 2,979), it is not necessary that the complaint should aver either of these facts.

The modern decisions relaxing the stringency of the earlier cases, admit to the benefit of insurance whatever act, event, or property bears such a relation to the person seeking the insurance that it can be said with a reasonable degree of probability to have a bearing upon his prospective pecuniary condition; yet such connection must be established between the subject-matter insured, and the party in whose favor the insurance had been effected, as may be sufficient for the purpose of deducing the existence of a loss to him from the occurrence of an injury to it.

A mortgagor and mortgagee each has an insurable interest in the mortgaged property, and each may insure for his own benefit; if the debt is paid before the loss or destruction of the property, the mortgagee cannot afterwards recover on his policy; but if a loss occurs before payment of the debt, and the insurer thereupon pays the loss, he is entitled to be subrogated to the rights of the assured, and may enforce the mortgage for his indemnity.

When a builder contracts to furnish materials and build a house for another person at a stipulated price, payable in installments as the work progresses, no property in the house vests in that person until it is finished and delivered, or, at least, until it is ready for delivery and approved.

If the builder, in such case, takes out a policy of insurance on the house during its construction, and it is destroyed by fire before its completion, the loss is his, although he may have received partial payment by installments; and having assigned the policy to the person for whom the house was built, the latter may maintain an action on it, or may assign it to another person, with whom he had effected insurance on the house.

MESSRS. TROY, TOMPKINS & LONDON, *Counsel for Appellants.*

SAYRE & GRAVES, *Contra.*

The opinion states the facts.

STONE, C. J.

It cannot be questioned that to maintain an action, such as the present one, there must have been when the policy was taken out, and when the loss occurred, such ownership or right as amounts to an insurable interest, and the plaintiff must show himself entitled to assert that interest: *Lynch vs. Daizell*, 3 Bro. Parl. Ca., 497; *Sadlers' Company vs. Badcock*, 2 Atk., 554; *Wilson vs. Hill*, 3 Metc. (Mass.), 66; 1 Phil. on Insurance, 59; *May on Insurance*, §§ 115, 116.

Form 16, Code of 1876, p. 704, is framed for a suit on a policy of insurance. It contains no averment of property, or insurable interest in the plaintiff. In section 2,979 of the code it is provided that "any pleading which conforms substantially to the schedule of forms attached to this part is sufficient." Form 16 is one of said forms. It must be inferred that the legislature treated the averment that the policy was issued by the insurance company as the equivalent, *prima facie*, of an averment that the assured owned an insurable interest in the property. Each count in the complaint is

sufficient, and the demurrer to it was rightly overruled: 2 Brick. Dig., 344-5.

On May 26, 1884, T. J. Holt, a builder and contractor, entered into a written agreement with Mrs. Barrett, by which he bound himself to furnish the materials and build a house for her according to certain plans and specifications; the house to be completed by October 1, 1884, with stipulated forfeiture in case the house was not finished by the agreed time. Mrs. Barrett promised and agreed to pay Holt, for so building the house, "two thousand and sixty-five dollars, which payments are to be made in installments as the work progresses, but she shall reserve at least three hundred dollars of said money until after the full completion of said house."

On August 11, 1884, the building being in progress, Holt, the contractor, took out a policy in the Commercial Fire Insurance Company, insuring the building against damage by fire in the sum of two thousand dollars, and for two months, extending to October 10, 1884. The policy, by its terms, insures Holt, his representatives and assigns, "against loss or damage by fire, to the amount of two thousand dollars, builder's risk, on the frame storehouse and dwelling, now in process of erection," describing its locality. The house was nearing completion, and Mrs. Barrett had paid Holt near nineteen hundred dollars on his contract, when on September 15, 1884, it was totally destroyed by fire.

On August 30, 1884, after Mrs. Barrett had so made the advance payments to Holt, she took out a policy from the Capital City Insurance Company, insuring said house to her, for the term of twelve months, "against loss or damage by fire to the amount of two thousand dollars, permission granted to complete the construction of said building and fences. Loss, if any, payable to the Home Building and Loan Association, as its interest may appear." The house, when destroyed, was still in the possession of the contractor, not having been delivered up to Mrs. Barrett. On the foregoing facts, it is contended for appellant that Holt had no insurable interest in the property, and that this action cannot be maintained.

After the fire, the policy issued by the Commercial Fire Insurance Company was assigned and transferred by Holt to Mrs. Barrett, and by her to the Capital City Insurance Company. The latter company brings this suit on said policy. We are not informed on what consideration these assignments were made. Possibly Holt's transfer was made in exoneration of an asserted liability resting on him to rebuild the house, the first not having been completed and delivered

to Mrs. Barrett. Possibly the Capital City Insurance Company paid the loss to Mrs. Barrett or to her appointee, and she in consideration thereof transferred to it the policy sued on in this action. If these surmises be true, this is but a contest between the two insurance companies as to which shall bear the ultimate loss.

"It may be said generally," says May in his work on Insurance, § 76, speaking of what will constitute an insurable interest, "that while the earlier cases show a disposition to restrict it to a clear, substantial, vested, pecuniary interest, and to deny its application to a mere expectancy without any vested right, the tendency of modern decisions is to relax the stringency of the earlier cases, and to admit to the protection of the contract whatever act, event, or property bears such a relation to the person seeking insurance, that it can be said with a reasonable degree of probability to have a bearing upon his prospective pecuniary condition. * * Yet such a connection must be established between the subject-matter insured and the party in whose behalf the insurance has been effected as may be sufficient for the purpose of deducing the existence of a loss to him from the occurrence of an injury to it." And in § 80, the same author says: "Whoever may fairly be said to have a reasonable expectation of deriving pecuniary advantage from the preservation of the subject-matter of insurance, whether that advantage inures to him personally, or as the representative of the rights or interests of another, has an insurable interest. * * That the person may suffer loss is a sufficient foundation for his claim to an insurable interest." Wherever property, either by form of law, or by the contract of the parties, is so charged, pledged, or hypothecated that it stands as a security for the payment of a debt, or the performance of a legal duty, each of the parties—the owner of the lien, and the person against whose property it exists—has an insurable interest in the property. The one, that the security shall remain sufficient; the other, that it may be kept unimpaired, and the property restored to his use or enjoyment in whole or in part, after the incumbrance is relieved. And each may insure his separate interest at one and the same time without incurring the imputation of double insurance, provided the applications and policies are the individual and separate acts of each: May on Insurance, §§ 80 to 87 inclusive; 1 Arnold on Insurance, 229 et seq.; Flanders on Fire Insurance, 342 et seq.; Columbia Insurance Company vs. Lawrence, 2 Pet., 25; Insurance Co. vs. Stinson, 103 U. S., 25; 4 Field's Lawyers' Briefs, 282 et seq.; Traders' Insurance Company vs. Robert, 9 Wend., 404;

Tyler vs. *Ætna Fire Ins. Co.*, 12 Wend., 507; Cone vs. *Niagara Insurance Co.*, 60 N. Y., 619; Sturm vs. *Atlantic Mut. Ins. Co.*, 63 N. Y., 77; Harvey vs. *Cherry*, 76 N. Y., 436; *Cumberland Bone Co. vs. Andes Ins. Co.*, 64 Me., 466; Hough vs. *People's Fire Ins. Co.*, 36 Md., 400; *Franklin Fire Ins. Co. vs. Coates*, 14 Md., 285; *Protection Fire Ins. Co. vs. Hall*, 15 B. Mon., 411; *Agricultural Ins. Co. vs. Clanny*, 9 Bardwell, 137; *Carter vs. Humboldt Fire Ins. Co.*, 12 Iowa, 287. In the last case it was said, "Any interest is insurable, if the peril against which insurance is made would bring upon the insured, by its immediate and direct effect, a pecuniary loss."

There are cases in the books where persons having only a lien on property to secure the payment of money due them, have, with their own means and in their own names taken insurance on such property, the lienor having no participation or agency in procuring the insurance, and not being in any manner provided for in the policy. Property insurance being only a contract of indemnity personal to the assured, it is held that destruction of the property and payment of the loss does not inure to the benefit of the debtor who has pledged the security. It leaves the debt still subsisting, unaffected by the payment of the loss. The reasons assigned are, that the debtor paid nothing for the insurance, did not solicit it, and the policy makes no provision for his indemnification. In such cases the debt remains in full force and collectible, the same as if nothing had been paid on the policy: *White vs. Davis*, 2 Cushing, 412; *King vs. State Mut. Fire Ins. Co.*, 7 Cush., 1; *Suffolk Fire Ins. Co. vs. Boyden*, 9 Allen, 123; *Cushing vs. Thompson*, 34 Me., 496; *Concord Union Mut. Fire Ins. Co. vs. Woodbury*, 45 Me., 447; *Hadley vs. N. H. Fire Ins. Co.*, 55 N. H., 110; *Steele vs. Franklin Fire Ins. Co.*, 17 Penn. St., 290; *Ely vs. Ely*, 80 Ill., 532; *Altharpe vs. Wolfe*, 22 N. Y., 355; *Hamner vs. Johnson*, 44 Ill., 192. See also *Mer. Ins. Co. vs. Mazange*, 22 Ala., 168; *Al. Mar. Ins. Co. vs. La. St. Ins. Co.*, 8 La., 1; *King vs. Preston*, 11 La. An., 95; *Clinton vs. Ins. Co.*, 45 N. Y., 454; *Henson vs. Blackwell*, 4 Hare, 434. It cannot be denied, however, that in cases of this character, the creditor realizes double satisfaction—a result somewhat opposed to sound, commercial morality.

Another principle, however, is gaining foothold, which may be considered the natural outgrowth of the seeming hardship of the double satisfaction mentioned above. It recognizes the fact that the two interests, such as that of mortgagor or lienor on the one side, and mortgagee or lienee on the other, and all kindred relations are each separately insurable. It treats the insurance obtained on property

thus held, when there are no stipulations to the contrary, as simply an insurance of the interest of the party who obtains the policy, and in no broader sense an insurance of the property. Hence, when one holding property in mortgage, pledge, or hypothecation, as security merely, obtains insurance upon it, he simply strengthens his security, and obtains indemnity against its impairment by the casualty insured against. The insurer in such case is held to be a guarantor, or indemnifier of the insured, that the debt or duty shall not become lost or forfeit by the destruction of the security or pledge. If the debt be paid or duty performed, then even a destruction of the property insured gives no right of action against the insurer. And if, in case of fire, the insurer indemnifies the assured by paying the loss, such insurer thereby becomes subrogated to the rights of the creditor or lienor against the debtor and may compel payment in re-imbursement of the loss it had paid. In the case of *Sussex Co. Mut. Ins. Co. vs. Woodruff* (2 Dutcher, 541), a case before the New Jersey Court of Errors and Appeals, this precise question was considered in a very important case. The court said: "A mortgagor and mortgagee may both insure their respective interests in the same building. The mortgagee insures his debt; and if before the policy expires the debt is paid, from that time the policy ceases to have any operation. The mortgagor has no interest in such a policy. If the property is destroyed by fire, the insurer, upon paying the insurance, is entitled to an assignment of the mortgage if the money paid amounts to the sum secured by the mortgage. If it is less, then he has an equitable lien upon the security in the hands of the mortgagee, to the extent of the insurance money so paid."

The case of *North British & Mer. Ins. Co. vs. Liverpool & London & Globe Ins. Co.* (5 Law Rep., Ch. Div., 569) was decided in 1877. It was a great case. Great by reason of the amount involved, and great because it was heard before the lord justices of the high court of justice of England. The facts were that Barnett & Co. were wharfingers, and doing a storage business at Rotherhithe. The measure of their liability for merchandise stored with them was, by custom of trade, precisely that of common carriers. They were insurers against all casualties, save those resulting from the act of God, or public enemies. All merchandise stored with them was fully covered by insurance policies, issued by various insurance companies to them, their interest being described in the policies as "the assured's own, in trust, or on commission, for which they are responsible." The North British & Mer. Ins. Co. had issued to them

one of these policies, which was of force at the time of the loss hereafter described. Rodocanachi & Co., merchants, had stored with Barnett & Co. merchandise worth forty thousand pounds sterling, on which they had partial insurance in their own favor as merchants. The Liverpool & London & Globe Insurance Company had issued one of the policies to Rodocanachi & Co. The merchandise was destroyed by fire, not the act of God, nor of the public enemy, and the insurers of Barnett & Co. fully indemnified them for the loss, who thereupon paid Rodocanachi & Co. their share of the loss. This suit was then brought by one of the insurers of Barnett & Co., which had aided in paying their loss against the Liverpool & London & Globe Insurance Company to compel the latter company to make contribution. The prayer of the bill was denied. The principle of the decision may be gathered from the following language, extracted from one of the opinions in the cause :—

The lord justice said : “There may be cases where, although two different persons insured in respect of different rights, each of them can recover the whole, as in the case of mortgagor and mortgagee. But whenever that is the case it will necessarily follow that one of these two has a remedy over against the other, because the same property cannot in value belong at the same time to two different persons. Each of them may have an interest which entitles him to insure for the full value, because in certain events, for instance, if the other person become insolvent, it may be he would lose the full value of the property, and therefore would have in law an insurable interest; but it must be that if each [has the right to] recover the full value of the property, from their respective offices with whom they insure, one office must [in the nature of things] have a remedy against the other. I think whenever that is the case the company which has insured the person who has the remedy over, succeeds to his right of remedy over, and then it is a case of subrogation.” To the same effect are the following authorities : *Ætna Fire Ins. Co. vs. Tyler*, 16 Wend., 385; *In re Kip vs. Receivers Mut. Fire Ins. Co.*, 4 Edw. Ch., 86; *Atlantic Ins. Co. vs. Royal Ins. Co.*, 55 N. Y., 343; *Honore vs. Lamar Fire Ins. Co.*, 51 Ill., 409; *Norwich Fire Ins. Co. vs. Boomer*, 52 Ill., 442; *Westchester Fire Ins. Co. vs. Foster*, 90 Ill., 121; *Godsall vs. Bolden*, 9 East., 72.

May, in his excellent work on Insurance, § 457 and note, scarcely gives his full assent to the doctrine stated above, when applied to cases of mere contract liability to answer over. We think, however, that the principle stands on impregnable grounds, and will follow it.

It is certainly true that the contract between Holt and Mrs. Barrett rested on what are called in the books independent covenants. He was not required to wait until the entire work was completed before demanding his pay; at least, before demanding all except three hundred dollars of the entire price: *Davis vs. Preston*, 6 Ala., 83; *Terry vs. Duntze*, 2 H. Blarkst., 389; *Cunningham vs. Morrell*, 10 Johns., 212; *Richardson vs. Shaw*, 1 Mo. App., 284. *Cunningham vs. Morrell*, departs from *Terry vs. Duntze* in one particular not material to this case. *Partridge vs. Forsyth* (29 Ala., 200) is relied on as showing, first, that the contract in the present case was not an entire one; and, second, that Holt had no insurable interest, and therefore there can be no recovery. *Partridge vs. Forsyth* did not present its points very saliently. Examining the report of that case, it cannot fail to be seen that the appellee obtained in the trial court all his testimony entitled him to, if not more. The question of merit presented in this court was, whether there was any testimony tending to disprove the entirety of the contract. We held there was; and there being no error in the rulings of the court on this question the judgment of the trial court was affirmed. As we have said, that case presented the single inquiry, whether Forsyth's completion of the building was a condition precedent to his right to demand compensation as the work progressed; and we ruled there was some testimony tending to disprove such term of the contract. Whether Forsyth, the contractor, was under a corresponding, independent covenant to rebuild, complete, and deliver the house after the burning, was neither presented, decided, nor considered.

The real question in this case is, whether Holt, at the time of the fire, had an insurable interest in the building. That depends on another inquiry. Was he bound under his contract to rebuild the house in the event of its destruction before completion and delivery, or, failing to do so, was he bound to refund to Mrs. Barrett the money she had paid him? In discussing this question we may treat the Capital City Insurance Company and Mrs. Barrett as one, and the Commercial Fire Insurance Company and Holt as one. Or, we may ignore both policies of insurance, and treat the contention as a suit by Mrs. Barrett against Holt, to recover damages for not building and completing the house according to the plans and specifications. If she could recover in such suit, then Holt's liability to her constituted an insurable interest in him, and the present action is maintainable.

There are cases which hold that when a shipbuilder contracts to build or repair a ship and furnish the materials at an agreed price, but to be paid in installments as the work progresses, the ship becomes the property of the employer pro tanto, as the payments are made : *Wood vs. Bell*, decided in Queen's Bench, 5 Ellis & Blackb., 772, and in the Court of Exchequer, 6 id., 355; s. c., 34 Eng. L. & Eq., 178; *Wood vs. Assignee*, 5 B. & Ald., 942; *Clarke vs. Spence*, 4 Adolph. & Ellis, 448. These, however, were cases where the shipbuilder had become bankrupt, and the question was whether the employer whose money had probably procured the materials and paid for the labor, should be remitted to the status of a general creditor. They were cases of hardship, and the rulings sustained the claims of the employers. So, in the case of *Menetone vs. Athawes*, (3 Burroughs, 1,592), the question arose on the repairs of a ship, where the ship was burned in dock before the repairs were completed. Lord Mansfield ruled that the owner was liable for the work which had been done before the ship was burned. A distinction may perhaps be drawn between a claim for repairs, and the claim for the construction of an entire ship.

So, in *Chitty on Contracts* (8 Amer. ed.), *474, is this language : "The destruction of work by an accidental fire or other misfortune, before it is finished or delivered, does not deprive the workman of his right of remuneration to the extent of the work performed; unless by the express and uniform custom of the trade, no payment is to be made until the work is completed and delivered." The author cites in support of the first principle the case of *Menetone vs. Athawes*, *supra*, and in support of the exception another ruling of Lord Mansfield, found in *Gillett vs. Mamman* (1 Taunt., 137). In the latter case a printer had bound himself to print and deliver a number of copies of a book, had completed and delivered a part, when the residue, in an incomplete state, were burned. He sued to recover for the copies delivered, and it was ruled he could not recover. It is doubtful if this ruling can be vindicated unless the books delivered in part performance had been restored to the printer.

In *Andrews vs. Durant* (1 Kernan, 35), the foregoing cases were reviewed, and the doctrine ably discussed by Judge Denio. He dissented from them entirely, as declarative of a general principle, and fortified his opinion with an ample array of authorities. He said : "In general a contract for the building of a vessel or other thing not yet in esse, does not vest any property in the party for whom it is agreed to be constructed during the progress of the

work, nor until it is finished and delivered, or at least ready for delivery, and approved by such party. And the law is the same, though it be agreed that payments shall be made to the builder during the progress of the work, and such payments are made accordingly." And the following cases fully sustain the doctrine asserted by Judge Denio: *Mucklow vs. Maugh's*, 1 Taunt., 318; *Adams vs. Nichols*, 19 Bick., 275; *Boyle vs. Agaman Canal Co.*, 22 Pick., 381; *Lawler vs. Burluison*, 2 Mees. & Wels., 602; *Merritt vs. Johnson*, 7 Johna., 473; *Johnson vs. Hunt*, 11 Wend., 135; *Gregory vs. Styker*, 2 Denio, 628; *Halterline vs. Rice*, 62 Barb., 593; *Scull vs. Shakespeare*, 75 Penn. St., 297; *Philadelphia vs. Brooks*, 81 Penn. St.; *West Jersey R. R. Co. vs. Trenton Car Works Co.*, 32 N. J. (Law), 517; *Elliott vs. Edwards*, 35 id., 265; s. c., 36 id., 449; *Williams vs. Jackman*, 16 Gray, 514; *Wright vs. Tetlow*, 99 Mass., 397; *Green vs. Hall*, 1 Hans. (Del.), 506; *Cowgill vs. Ford*, 2 id., 164; *Calais Steamboat Co. vs. Scudder*, 2 Black U. S., 372; 1 Benj. on Sales (4th Amer. ed.), §§ 408-413.

It will be seen by comparing the authorities cited above that the American rule differs from the English. We think those on this side the Atlantic rest on a much sounder basis, and we will follow them.

The house not having been finished nor delivered by Holt to Mrs. Barrett, its destruction was his loss. He therefore had an insurable interest. Affirmed. Clopton, J., not sitting.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

In Error to the Supreme Court of the State of New York.

FIRE ASS'N OF PHILADELPHIA, *Plaintiff in Error,*

v.

PEOPLE OF THE STATE OF NEW YORK.*

A Pennsylvania company authorized to do business in New York, and complying from year to year with the requirements of that State, was, under a law subsequently passed, called on to pay reciprocal taxes such as were imposed by Pennsylvania on companies incorporated in New York, which were in excess of those imposed on corporations of other States.

Held, That the corporation was not a person within the meaning of the fourteenth constitutional amendment, which provided that no State should deny to any person within its jurisdiction the equal protection of its laws.

Held, That the State might impose such conditions as it chose as a prerequisite for doing business, subject only to such limitations on the sovereignty as may be found in the fundamental laws of the Union.

Held, That the State had power to change its requirements from year to year, and compliance with such requirements only entitled the company to the privilege of admission during the term. By going into the State it assented to such prerequisites as the State might from time to time impose. It could not be of right within the jurisdiction until it had received the consent of the State under the new provisions which exacted compliance with the reciprocal law.

BLATCHFORD, J.

This is a writ of error to the Supreme Court of the State of New York. Under the provisions of § 1,279 of the Code of Civil Procedure of New York, the People of the State of New York and the Fire Association of Philadelphia, a Pennsylvania corporation, being

* Decision rendered, November 15, 1886.

parties to a question in difference which might be the subject of an action, agreed upon a case containing a statement of the facts on which the controversy depended, and presented a written submission of it to the Supreme Court of New York, so that the controversy became an action. The material facts set forth in the case are these:—

“The defendant, the Fire Association of Philadelphia, is a corporation created and organized in the year 1820, by and under the laws of the State of Pennsylvania, for the transaction of the business of fire insurance, and having its principal place of business in the city of Philadelphia. In the year 1872 it established an agency in the State of New York, which it has ever since maintained. No question is here raised but that it has uniformly complied with all the requirements and conditions imposed by the laws of this State upon fire insurance companies from other States establishing and maintaining agencies in this State, except the payment of the tax now in dispute, upon premiums received by it in 1881 upon risks located within the State of New York, and which is the subject of this controversy, and has received from year to year certificates of authority from the superintendent of the insurance department of this State, as provided to be issued under the act, chapter 466 of the laws of 1853, and the subsequent acts amendatory thereof.

“The act of the people of the State of New York, passed May 11, 1865, three-fifths being present, being chapter 694 of the laws of 1865, entitled ‘An act in relation to the deposits required to be made, and the taxes, fines, fees, and other charges payable by insurance companies of sister States,’ as amended by the act of 1875, chapter 60, provides as follows, viz.: ‘Whenever the existing or future laws of any other State of the United States shall require of insurance companies, incorporated by or organized under the laws of this State, and having agencies in such other States, or of the agents thereof, any deposit of securities in such State for the protection of policy-holders or otherwise, or any payment for taxes, fines, penalties, certificates of authority, license fees, or otherwise, greater than the amount required for such purposes from similar companies of other States by the then existing laws of this State, then, and in every such case, all companies of such States establishing, or having heretofore established, an agency, or agencies in the State, shall be and are hereby required to make the same deposit for a like purpose in the insurance department of the State, and to pay the superintendent of said department for taxes, fines, penal-

ties, certificates of authority, license fees, and otherwise, an amount equal to the amount of such charges and payments imposed by the laws of such State upon the companies of this State and the agents thereof; and the superintendent of the insurance department is hereby authorized to remit any of the fees and charges which he is required to collect by existing laws, except such as he is required to collect under and by virtue of this act, provided, however, that no discrimination shall be made in favor of one company over any other from the same State.'

"The State of Pennsylvania, by an act passed April 4, 1873, and ever since in force, enacted as follows, viz.: 'Section 10. No person shall act as agent or solicitor in this State of any insurance company of another State, or foreign government, in any manner whatever relating to risks, until the provisions of this act have been complied with on the part of the company or association, and there has been granted to said company or association, by the commissioner, a certificate of authority, showing that the company or association is authorized to transact business in this State; and it shall be the duty of every such company or association, authorized to transact business in this State, to make report to the commissioner in the month of January of each year, under oath of the president or secretary thereof, showing the entire amount of premiums of every character and description received by said company or association in this State, during the year or fraction of a year ending with the thirty-first day of December preceding, whether said premiums were received in money or in the form of notes, credits or any other substitute for money, and pay into the State treasury a tax of three per centum upon said premiums; and the commissioner shall not have power to grant a renewal of the certificate of said company or association until the tax aforesaid is paid into the State treasury.'"

In the year 1881, the defendant, through its authorized agents in the State of New York, received for insurance against loss or injury by fire, upon property located within the State of New York, premiums to the aggregate amount of \$196,170.22. The superintendent of the insurance department of New York claimed that the defendant ought to pay, as a tax, for the year 1881, \$1,848.45, with proper interest, being the amount arrived at by deducting from \$5,885.10 (which would be a tax of 3 per cent on \$196,170.22), the sum of \$4,036.65, which the defendant, as a Pennsylvania corporation, had paid as a tax on premiums, during 1881, under laws of New York in force in 1881, other than the act of 1865, as amended

by the act of 1875. The case then states, that "the controversy between the parties is, as to whether the defendant is liable to pay any tax to the superintendent of the insurance department of the State, upon the said premiums received by it in the year 1881, and, if any, what amount;" that "the defendant claims that it is not liable to the plaintiffs for any amount, insisting, first, that the said act of 1865, as amended by the act of 1875, is unconstitutional and void, and not a legitimate exercise of legislative power," and making further claims as to the amount due from it if the act in question is valid; that "the question submitted to the court for decision upon the foregoing statement of facts is, whether the defendant is liable to pay to the plaintiffs, or to the superintendent, the whole, or any, and, if any, what part of the" \$1,848.45; and that judgment is to be entered according to its decision.

The agreed case having been heard by the supreme court in general term, as required by law, it rendered a judgment to the effect that the defendant was not liable to pay any part of such amount claimed by the superintendent. Two of the three judges holding the court concurred in that judgment. The third dissented. The opinions of the majority and minority accompany the record. The majority held that the statutes of New York in question were void because in conflict with the constitution of New York, and did not discuss any question arising under the constitution of the United States. The dissenting judge differed with the majority as to the question adjudged by them, and further said: "Nor can I agree with the claim that this statute is contrary to the fourteenth amendment to the constitution of the United States."

The plaintiffs having appealed to the Court of Appeals of New York, that court reversed the judgment of the supreme court, and rendered judgment for the plaintiffs for \$1,848.45, with interest and costs, and remitted the record to the supreme court, where a judgment to that effect was entered, to review which the defendant has brought a writ of error. The court of appeals, in its decision, (92 N. Y., 311), after overruling the view taken by the majority of the judges of the supreme court as to the validity of the statute under the constitution of New York, proceeds to consider its constitutionality under that clause of the fourteenth amendment to the Federal constitution which commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." It holds that that clause has no application to the rights of the defendant, because, being a foreign corporation, it was not within

the jurisdiction of New York until it was admitted by the State, upon a compliance with the conditions of admission which the State imposed and had the right to impose.

The defendant claims here the benefit of the fourteenth amendment, and a question has occurred as to whether the record presents that point for our review. There being no pleadings, the obvious place to look for the claim would be the agreed statement of facts. But all that is there said is, that the defendant insists that the statute is "unconstitutional and void and not a legitimate exercise of legislative power." The question was considered, in both the supreme court and court of appeals, as to the validity of the statute, under the constitution of New York, as being a law made to depend for its operation on the legislation of a foreign State, and thus an illegitimate exercise of legislative power. This contention is fairly within the words of the agreed statement, and, if it depended wholly on that statement to determine whether the record raises a Federal question, some doubt might exist. But in view of what was said in *Murdock vs. Memphis* (20 Wall., 590, 633), in *Gross vs. United States Mortgage Co.* (108 U. S., 477), and in *Adams County vs. Burlington & Mo. R. R. Co.* (112 U. S., 123), we think that we are at liberty to look into the opinion of the court of appeals, a copy of which, duly authenticated by the proper officer, is transmitted to us with the record, in compliance with our 8th rule, for the purpose of aiding in determining what was decided by that court. From that opinion it appears that the court not only decided against the defendant all the questions other than Federal which were raised, including two under the constitution of New York, but also decided against it the Federal question referred to. If the court had decided in its favor any one of the other questions which went to the whole cause of action, there would have been no necessity for considering the Federal question. But as it was, the decision of that question became necessary to the disposition of the case, and was fully considered, not *sua sponte*, but as a point presented by the defendant.

The provision of the fourteenth amendment, which went into effect in July, 1868, is, that no State shall "deny to any person within its jurisdiction the equal protection of the laws." The first question which arises is, whether this corporation was a person within the jurisdiction of the State of New York, with reference to the subject of controversy and within the meaning of the amendment.

The defendant, on the assumption that if it was within the jurisdiction of the State of New York, it was, though a foreign corporation, a "person," and so entitled to the benefit of the amendment, contends that it was within such jurisdiction. The argument is, that it established an agency within the State in 1872, which it had ever since maintained; that it complied from year to year with all the requirements and conditions imposed by the laws of the State on foreign fire insurance companies doing business in the State; that it received from year to year certificates of authority from the superintendent of the insurance department, as provided by statute; that under those circumstances, it was legally within the State and within its jurisdiction; that being in the State by permission of the State, continuously from 1872 to 1882, the State imposed on it, while there in 1882, an unequal and unlawful burden; and that the New York act of 1865 did not come into effect as to Pennsylvania corporations until the Pennsylvania act of 1873 was passed, at which time the defendant had already been a year in the State.

But we are unable to take that view of the case. In *Paul vs. Virginia* (8 Wall., 168), at December term, 1868, a statute of Virginia required that every insurance company not incorporated by Virginia should, as a condition of carrying on business in Virginia, deposit securities with the State treasurer, and afterwards obtain a license; and another statute made it a penal offense for a person to act in Virginia as agent for an insurance company not incorporated by Virginia, without such license. A person having acted as such agent without a license, and been convicted and fined under the statute, this court held that there had been no violation of that clause of article 4, section 2 of the constitution of the United States which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;" nor any violation of the clause in article 1, section 8, giving power to Congress "to regulate commerce with foreign nations and among the several States." The view announced was, that corporations are not citizens within the clause first cited, on the ground that the privileges and immunities secured to the citizens of each State in the several States, are those which are common to the citizens of the latter States, under their constitutions and laws, by virtue of their being citizens; and that as a corporation created by a State is a mere creation of local law, even the recognition of its existence by other States, and the enforcement of its contracts made therein, depend purely on the comity of those States—a comity which is never ex-

tended where the existence of the corporation or the exercise of its powers is "prejudicial to their interests or repugnant to their policy." And the court, speaking by Mr. Justice Field, said: "Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." As to the power of Congress to regulate commerce among the several States, the court said, that while the power conferred included commerce carried on by corporations as well as that carried on by individuals, "issuing a policy of insurance is not a transaction of commerce." This decision only followed the principles laid down in the earlier cases of *Bank of Augusta vs. Earle* (13 Peters, 519, 588) and *Lafayette Ins. Co. vs. French* (18 How., 404).

The same rulings were followed in *Ducat vs. Chicago* (10 Wall, 410), where it was said that the power of a State to discriminate between her own corporations and those of other States desirous of transacting business within her jurisdiction being clearly established, it belonged to the State to determine as to the nature or degree of discrimination, "subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union."

Other cases to the same effect are *Liverpool Ins. Co. vs. Massachusetts* (10 Wall, 566); *Doyle vs. Continental Ins. Co.* (94 U. S., 535); and *Cooper Mfg. Co. vs. Ferguson* (113 U. S., 727).

As early as 1853, the State of New York, by a statute (chap. 466), required of every fire insurance company incorporated by any other State or any foreign government, as a prerequisite to doing business in the State, that it should file an appointment of an attorney on whom process was to be served, and a statement of its pecuniary condition, and procure from a designated public officer a certificate of authority stating that the company had complied with all the requisitions of the statute; and also required the renewal from year to year of the statement and evidence of investments; and provided that such public officer, on being satisfied that the capital of the company and its securities and investments remained secure, should furnish a renewal of the certificate of authority. A violation of the

provisions was made a penal offense. This act, with immaterial amendments, is still in force.

This Pennsylvania corporation came into the State of New York to do business, by the consent of the State, under this act of 1853, with a license granted for a year, and has received such license annually, to run for a year. It is within the State for any given year under such license, and subject to the conditions prescribed by statute. The State, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation until it pays such license fee, is not admitted within the State or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given. The act of 1865 had been passed when the corporation first established an agency in the State. The amendment of 1875 changed the act of 1865 only by giving to the superintendent the power of remitting the fees and charges required to be collected by then existing laws. Therefore, the corporation was at all times, after 1872, subject, as a prerequisite to its power to do business in New York, to the same license fee its own State might thereafter impose on New York companies doing business in Pennsylvania. By going into the State of New York in 1872, it assented to such prerequisite as a condition of its admission within the jurisdiction of New York. It could not be of right within such jurisdiction, until it should receive the consent of the State to its entrance therein under the new provisions, and such consent could not be given until the tax, as a license fee for the future, should be paid.

It is not to be implied, from anything we have said, that the power of a State to exclude a foreign corporation from doing business within its limits is to be regarded as extending to an interference with the transaction of commerce between that State and other States by a corporation created by one of such other States.

Judgment affirmed.

SUPREME COURT OF PENNSYLVANIA.

CORSON'S APPEAL.*

A nephew to whom his aunt was indebted, the amount through unsettled business relations being uncertain, took out a policy on her life on his own motion and himself paying the premiums for \$2,000; the indebtedness was subsequently found to have been between \$500 and \$750.

Held, That the assured must have an insurable interest, but this is not necessarily a definite pecuniary interest, but such as will justify a well-grounded expectation of advantage resulting from the life insured.

Held, That the mere relationship of nephew and aunt would not give such an interest, but that the amount and uncertainty of the indebtedness would justify the policy taken in good faith.

Held, That such an interest subsisting at the inception of the contract, and the aunt being in no way a party to the contract, the case is not affected by the fact that the debt was afterwards paid.

Held, That the nephew, and not the representatives of the aunt, was entitled to the insurance money.

JOHN SPARHAWK, JR., and N. DU BOIS MILLER, Esqs., for Appellant.

J. H. ANDERS and WILLIAM F. JOHNSON, Esq., for Appellee.

CLARK, J.

Although a policy of life insurance is not, like a fire or marine policy, a mere contract of indemnity, but a contract to pay a certain sum of money in the event of death (*Scott vs. Dickson*, 42 Leg. Intell., 362), yet the assured is not entitled to his action on the policy unless he had, as the basis of his contract, an interest in the subject-matter insured. This is a rule founded in public policy, and is of general application: *Ruse vs. Mutual Benefit Co.*, 23 N. Y., 516. If it were not so the whole system of life insurance would become the mere cover for wicked speculation by wager in human life, and thus prove the occasion for the commission of the grossest crimes.

An insurable interest, however, is not necessarily a definite pecuni-

* Decision rendered, October 4, 1886.

ary interest, such as is recognized and protected at law; it may be contingent, restricted as to time, or indeterminate in amount, but it must be actual, such as will reasonably justify a well-grounded expectation of advantage, dependent upon the life insured, so that the purpose of the party effecting the insurance may be to secure that advantage, and not merely to put a wager upon human life. Therefore a wife has an insurable interest in the life of her husband, or the husband in the life of the wife: *Baker vs. Union Mutual Life*, 34 N. Y., 283; and a single woman, under contract to marry, in the life of her intended husband: *Chisholm vs. National Life Co.*, 52 Mo., 213. A parent has in like manner an insurable interest in the life of a child, and a child in the life of a parent: *Loomis vs. Eagle Insurance Co.*, 6 Gray, 396; *Mitchell vs. Union Life Co.*, 45 Me., 104; *Reserve Mutual Co. vs. Kane*, 31 P. F. S., 154. In the case last cited this court said: "It would be technical in the extreme to say that a son has no insurable interest in his father's life. Poverty may overtake the father in his lifetime, and thus father and mother be cast upon the son; or, if the father die before her, the necessity may fall at once upon the son. Why, then, should he not be permitted to make a provision by insurance to re-imburse himself for his outlays, past or future? What injury is done to the insurance company? They received the full premium, and they know in such case, from the very relationship of the parties, that the contract is not a mere gambling adventure, but is founded in the best feelings of our nature, and on a legal duty which may arise at any time."

In *Lord vs. Dall* (12 Mass., 115), a young unmarried female, without property, who for several years had been supported and educated at the expense of her brother, who stood to her in loco parentis, was held to have an insurable interest in his life. So, also, a creditor has an insurable interest in the life of his debtor: *American Life Insurance Co. vs. Robertshaw*, 2 Casey, 189; *Cunningham vs. Smith's Executors*, 20 P. F. S., 450. In *Keystone Mutual Association vs. Beaverson* (16 W. N. C., 188), the assured, an unmarried lady, lived with her brother, who supported or maintained her in his family under circumstances tending to constitute the relation of debtor and creditor between them, and it was held that he had such an insurable interest in her life as would support a policy of insurance taken out by him therein. "This case," says the court, "was not submitted to the jury under a ruling that the mere fact of a person on whose life the policy was taken being a sister of the defendant in error, gave to the latter an insurable interest in her life, although

reputable authorities have recognized such relationship to be sufficient: *Ætna Life Insurance Co. vs. France*, 4 Otto, 562. In the present case evidence was given that he was supporting and maintaining her in his family, under circumstances tending to constitute the relation of debtor and creditor. It was under all the facts of the case that the court held he had an insurable interest in the life of his sister. It was very clear that the insurance was obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which he had no interest: *Scott vs. Dickson*, ante, p. 181. The policy in question shows the willingness of the company to take the risk on the ground of relationship alone."

The rule deducible from all the cases is thus stated in *Warnock vs. Davis* (14 Otto, 775) by Mr. Justice Field: "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wagering policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of a child, and a child in the life of his parent; a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful, as operating more efficaciously to protect the life of the insured, than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary, or of blood or affinity, to expect some benefit or advantage from the continuance of the assured; otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned as being against public policy."

It cannot be pretended that Garnier had an insurable interest in the life of his aunt by force of the mere relationship existing between them; no case has been brought to our notice which carries the rule to this extent. Between husband and wife, and parent and child, the relationship is so close and intimate, and the mutual dependence and legal liability for support so manifest, that nothing

more is wanting to establish the insurable interest. Garnier, however, did not hold any such relation to Ellen McLean, either natural or assumed; he was simply her "friend and adviser." He was doubtless a valuable friend; he had advanced money to bring her to Philadelphia; he fitted up, stocked, and from time to time replenished, the store at Tenth and Manilla; having disposed of this for her benefit he purchased the establishment on Fitzwater Street, and, selling this, he bought for her a third, on Fifth, below Christian. She repaid Garnier, however, for his outlays in her behalf from time to time from the ordinary receipts of the several stores, and from the proceeds of the sales.

The only relation existing between James Garnier and Ellen McLean which could give Garnier an insurable interest in her life, was that of debtor and creditor, and upon this ground alone the case must be considered. It is not denied that at the date of the policy, Mrs. McLean was indebted to Garnier for money advanced and expended in her behalf, in some amount between \$500 and \$750. It is said, however, that Garnier, in his answer, disclaims as a creditor; that he places his right to the proceeds of the policy on other grounds, and makes no claim whatever by reason of any indebtedness. We do not so understand either the answer or the evidence given by the defendant in the case. The bill charges in the first paragraph, in substance, that the policy was taken out and applied as a collateral security to the debt which Mrs. McLean then owed Garnier; and in the subsequent paragraphs, that the debt having been fully paid in the lifetime of the assured, the proceeds of the policy should pass into her estate. This fact is specifically denied; the defendant in his answer says, it is "not true that the policy of insurance, referred to in paragraph one of the complainant's bill, was applied for and issued upon the life of Ellen McLean for any such reason or purpose as therein stated."

It is undisputed, however, that at the issuing of the policy, the relation of debtor and creditor did exist, and to the extent stated; the defendant having denied that the policy was taken as collateral security for that debt, a question of fact is thus raised to be determined by the evidence. Upon examination of the proofs we find no evidence from which the fact might be fairly inferred. The insurance was not effected at the instance of Mrs. McLean, but at the suggestion of her son, Samuel McClatchy, in whose name a second policy in \$1,000 was at the same time issued; the premiums were paid and the policy maintained by Garnier; indeed, there is not the slightest

proof in support of the plaintiff's hypothesis, that the policy was held in trust for the debtor, and, in the absence of such proof, the presumption is, that the rights of the parties appear upon the face of the policy: *Cunningham vs. Smith*, 29 P. F. Smith, 450.

It has been said, however, on the authority of *Goodsall vs. Boldero* (9 East., 72), that an insurance upon the life of a debtor in behalf of a creditor is, in legal effect, but a guaranty of the debt, and if the debt is paid the insurance is at an end; but it is now settled that this case is not the law; it was directly drawn in question, and was expressly overruled in *Dalby vs. India and London Life Ins. Co.*, decided in the Exchequer Chamber, 15 C. B., 365. The law seems to be well settled that it is wholly unnecessary to prove an insurable interest in the life of the assured at the maturity of the policy, if it was valid at its inception, and in the absence of express stipulation to the contrary, the sum expressed on the face of the policy is the measure of recovery: *Rawle vs. American Mut. Ins. Co.*, 27 N. Y., 282; *Mowry vs. Home Ins. Co.*, 9 R. I. (1869); *Hoyt vs. N. Y. Life Ins. Co.*, 3 Bosw., 440; *Phoenix Mut. Ins. Co. vs. Bailey*, 13 Wallace, 616.

The doctrine of all the cases to which our attention has been called is, that if the policy was originally valid, it does not cease to be so by cessation of interest in the subject of insurance, unless such be the necessary effect of the provisions of the instrument itself. Therefore, where a husband insured his life for the benefit of his wife, and was subsequently divorced, it was held, that, notwithstanding the relation of husband and wife no longer existed, and her insurable interest had thus ceased, yet she could recover the full amount of the policy: *Commonwealth Mutual Life vs. Schaffer*, 4 Otto, 457. "Supposing a fair and proper insurable interest of whatever kind," says the court in the case last cited, "to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained, and there is then no good reason why the contract should not be carried out according to its terms." To the same effect is *McKee vs. Phoenix Company*, 28 Mo., 383.

All the cases to which we have referred, it is true, arose from suits brought upon the policies of insurance, but the same principles apply where the company, admitting its liability, has paid the money into court to abide the result, and the controversy is between the remaining parties.

In our own case of *Scott vs. Dickson* (42 Legal Intell., 362) our brother Paxson, upon a review of the cases, concludes, that where

one has an insurable interest at the time an insurance is effected upon the life of another for his benefit, the fact that his interest ceases to exist at or prior to the death of the insured, will not, as against the personal representatives of the insured, deprive him of the right to receive the insurance money; therefore, it was held, that a surety on an official bond had an insurable interest in the life of the obligor, and that his right to recover upon the policy was not affected by the fact that no breach of the condition of the bond had ever occurred. But a merely colorable, temporary, or disproportionate interest may present circumstances from which want of good faith, and an intent to evade the rule, may be inferred; therefore, although the relation of debtor and creditor may in general be said to establish an insurable interest, the amount of the insurance placed upon the life of the debtor cannot be grossly disproportionate to the benefit which might be reasonably supposed to accrue from the continuance of the debtor's life, without leaving the transaction open to the imputation of being a speculation or wager upon the hazard of a life: *Wainwright vs. Bland*, 1 Moody & Rob., 481; *Miller vs. Eagle Life Ins. Co.*, 2 Smith, N. Y., 268.

The case of *Cammack vs. Lewis* (15 Wallace, 643) is exactly in point; the policy was taken out by Cammack, the creditor, upon the life of Lewis, his debtor, in the sum of \$3,000—\$2,000 for his own benefit and \$1,000 for the benefit of Lewis. Lewis in fact owed Cammack \$70, although he voluntarily and without consideration gave his obligation at the time for \$3,000. "If the transaction," says Mr. Justice Miller, "as set up by Cammack, be true, then, so far as he was concerned, it was a sheer wagering policy, and probably a fraud on the insurance company. To procure a policy for \$3,000 to cover a debt of \$70 is of itself a mere wager. The disproportion between the real interest of the creditor and the amount to be received by him deprives it of all pretense to be a bona fide effort to secure the debt, and the strength of this proposition is not diminished by the fact that Cammack was only to get \$2,000 out of the \$3,000; nor is it weakened by the fact that the policy was taken out in the name of Lewis, and assigned by him to Cammack. This view of the subject receives confirmation from the note executed by Lewis to Cammack for the precise amount of the risk in the policy, which, if Cammack's account be true, was without consideration, and could only have been intended for some purpose of deception; probably to impose on the insurance company." See also *Conn. Mut. Co. vs. Lucka*, 108 U. S. R., 498.

In the case at bar the policy was \$2,000; the amount of the indebtedness was at the time undetermined, and therefore uncertain; it has since been ascertained to have been between \$500 and \$750. Considering the character of their business relations, the unsettled condition of their affairs, the age of the subject of insurance, the probable amount of premiums which might accrue, the accumulations from interest, we could not say the transaction carries with it any inherent evidence of bad faith. The essential thing is, as stated by the learned judge of the court below, that the policy should be obtained in good faith, and not for purposes of speculation, upon the hazard of a life in which the insured has no interest. The case is materially different from *Gilbert vs. Moose et al.* (41 Legal Intell., 75); the principles involved in that case are not drawn in question here.

We find no error in the decree of the court below, and it is therefore affirmed.

The decree is affirmed, and the appeal dismissed at the cost of the appellant.

SUPREME COURT OF IOWA.

Appeal from Decatur District Court.

SILTZ,

vs.

HAWKEYE INS. CO.*

In an action against a fire insurance company, the admission of the statements in evidence of a soliciting agent, proved to be an officer and stockholder of the company, if error at all, is error without prejudice.

In an action against a fire insurance company, a witness may testify as to the value of goods destroyed, designated by certain terms, if he is familiar with the designation, without the objection of his being called on to construe the policy, or to determine what goods are covered by the description.

Where a defense is pleaded in answer to a complaint, and the issue thereon is fairly and fully presented in an instruction, it is as well presented in that connection as though it had been found in the statement of the pleadings and issues preceding the instructions.

If, in an action on a fire insurance policy, there is no controversy at the trial as to the value of the property, and the plaintiff testifies that she paid a certain sum for it, and its value is stated at that sum in the application for insurance, in the absence of any evidence or claims to the contrary, the jury may find its value in that sum.

Where, in an action against a fire insurance company, the company pleads the existence of a mortgage, and the plaintiff replies that when the insurance was effected she fully explained it, and further replies that any breaches of the condition of the policy which may have occurred were waived by the act of the assistant secretary of the company, in requiring and taking proof of loss, which he pronounces sufficient, at the same time informing plaintiff that the loss would be paid, she is entitled to recover in the action.

In an action against a fire insurance company, the court need not instruct the jury as to agent's authority to do certain acts on which a claim of waiver is based, where the reply of plaintiff pleads a waiver, which is not denied.

* Decision rendered, October 19, 1886.—From *Northwestern Reporter*.

"The forfeiture of a policy of insurance on account of a breach of its conditions may be waived, and, when the waiver is made, it will have the same binding force it originally possessed.

In an action against a fire insurance company, knowledge of facts possessed by an agent is chargeable to the company.

"The verdict of a jury will not be disturbed because the evidence may be meager, or does not satisfy the mind of the court.

Action at law upon a policy of insurance, to recover the amount insured against loss by fire upon a building and certain contents owned by plaintiff. There was a judgment upon a verdict for plaintiff. Defendant appeals.

PHILLIPS & DAY, *for Appellant.*

E. W. CURRY, BULLOCK & HOFFMAN, and J. B. JOHNSON, *for Appellee.*

BECK, J.

1. We will, in the consideration of the case, notice the objections to the judgment in the order of their presentation by defendant's counsel, and will state the facts involved in each point in connection with the discussion thereof.

F. S. Siltz, the husband of plaintiff, and a witness in her behalf, testified that, three or four days after the fire, W. C. Cole came to the house of the witness, claiming to represent defendant, and that the purpose of his visit was to settle and adjust the loss. He made out proofs of loss. The witness was then permitted to state, over defendant's objection, that Cole said he was the assistant secretary of defendant. The evidence was admitted, upon the proposition of plaintiff's counsel to follow it with other evidence showing the official relation of Cole to defendant. Such evidence was afterwards introduced, and shows conclusively that he was the assistant secretary, and a director and stockholder of the company; that he visited the plaintiff as an agent of the company, after the loss, with reference to it; and that he prepared papers, or superintended or assisted in their preparation, pertaining to the proofs of loss, though he did not complete such proof. The fact that Cole was assistant secretary of defendant being conclusively established by other testimony, the admission in evidence of his declarations or statements to that effect, if erroneous, is without prejudice to defendant.

2. The policy covered certain personal property, described in it as "restaurant goods." A witness was asked the value of these goods, and in response was permitted, over defendant's objection, to state it. The objection is based upon the ground that the question called upon the witness to construe the language of the policy, and deter-

mine what goods were covered by the description. There is no force in the objection. If the goods were so generally known as to be described in the policy by the designation "restaurant goods," it will be presumed that the witness understood the designation. He certainly could refer to the goods by the name used in the policy to designate them. If any question existed as to the goods valued by him belonging to the class covered by the policy, the witness could have been called on, in the cross-examination, to further describe the goods to which he referred in his answer.

3. Two or three objections to the admission of evidence are referred to in defendant's argument simply by a statement of the points made, without any argument thereon. We are not required to consider points not argued.

4. The policy contains a condition to the effect that, in case of loss, if there be liens or incumbrances on the property, defendant shall be liable for no more than three-fourths of the interest of assured, after deducting from the actual cash value of the property the amount of the liens or incumbrances. The answer alleges that there was a mortgage upon the property, and that its value, determined by the terms of the policy, did not exceed the amount due upon the mortgage. Counsel for defendant complain that the court below omitted to present the issues raised by this defense. There is no ground for this complaint. The defense pleaded, and the issues thereon are fairly and fully presented in an instruction,—the tenth. It is as well presented in that connection as though it had been found in the statement of the pleadings and issues preceding the instructions.

5. The court, in the same instruction, directed the jury, if they found plaintiff entitled to recover, to deduct the amount of the mortgage from the value of the property, and if the sum thus ascertained equaled or exceeded the amount they found for plaintiff, which must not exceed the sum insured on the property, they could render a verdict for the plaintiff in the amount thus found for her. Counsel insist that this instruction should not have been given, for the reason that there was no evidence of the value of the property. Upon this question there was no controversy in the evidence at the trial. Plaintiff testified that she gave \$3,500 for the real estate, and its value is stated at that sum in the application for insurance. In the absence of any evidence or claim to the contrary, the jury were authorized, for the purpose of the inquiry, to find its value in that sum.

6. The policy contained a condition to the effect that "any fraud, or attempt to defraud, or false oath or declaration, or claim for an amount more than is actually due," shall defeat recovery on the policy. The answer alleges that plaintiff violated this condition by filing her petition in this case, under oath, alleging the value of the property destroyed to be \$1,000, and that the amount of the policy (\$750) is due her, and did not disclose the existence of the mortgage; that she further violated it in her proofs of loss, by stating the value of the personal property at a sum in excess of its true value; and that she also violated the condition by claiming, in her proof of loss, a sum largely in excess of what was actually due her. It is insisted that this defense was not fairly and fully presented by instructions to the jury. The ground of counsel's complaint is that the court did not distinguish between fraud and attempt to defraud, and direct the jury accordingly. We think it was needless for the court to burden the jury with such distractions and instructions, and that the jury were sufficiently instructed upon the issue presented by the defense. The answer alleges certain acts and omissions of the plaintiff which it is claimed, under the condition in question, are sufficient to defeat recovery. The court below correctly directed the jury as to the legal effect of the acts of plaintiff relied upon to support the defense. It was not necessary or important that the court should have considered or directed the jury to consider whether these acts were frauds or attempts to defraud. Without such an inquiry, the jury were well prepared to find, as to the facts, in accord with the instructions of the court.

7. The defendant, as a defense under a condition of the policy, set up in its answer the existence of a mortgage. The plaintiff in her reply alleged that, when the insurance was effected, she fully explained to defendant's agent all matters connected with the mortgage, the date of its execution, the amount paid upon it, the date of its maturity, the fact that she held a valid defense for a partial failure of consideration, which she intended to set up, and, in order to obtain an abatement of the amount due upon the face of the mortgage, she was advised that it would be necessary to permit an action of foreclosure to be brought upon it, which she intended to do. She further stated in her reply that any breaches of the condition of the policy which may have occurred were waived by the act of the assistant secretary of defendant in requiring and taking proof of loss, which he pronounced sufficient, at the same time informing plaintiff that the loss would be paid.

8. It is objected that an instruction (the fifth) directs the jury that matters may be regarded as raising a waiver of the breach of conditions which were not pleaded in plaintiff's reply. This objection we find, upon a comparison of the reply and instruction, is not supported by the facts. We find that all matters contemplated in the instruction are pleaded in the reply.

9. It is urged by counsel, in their discussion of the fifth instruction, that neither in it or elsewhere did the court direct the jury to find that Cole, who, it is alleged, acted for defendant in making the waiver, was authorized so to do. But the authority of Cole to act for defendant was proved beyond question in the court below. As we have shown, he was proved to be the assistant secretary, and the reply pleading the waiver alleges that he acted for defendant as assistant secretary in doing the things upon which the claim of waiver is based. The allegations of the reply are not denied by the defendant, and the evidence shows, without contradiction, that Cole was assistant secretary, and did act for defendant. Under these circumstances, we think there was no prejudicial error in the failure of the court to direct the jury to find as to Cole's authority to do the acts upon which the claim of waiver is based.

10. Counsel for defendant insist that, by the breach of the conditions of the policy, it becomes "null and void," and incapable of being revived or restored by a waiver of the breach. The grounds upon which this view is based are noticed and considered in *Viele vs. Germania Ins. Co.* (26 Iowa, 9), and it is held that the forfeiture of a policy on account of a breach of its conditions may be waived, whereupon it will have the same binding force it originally possessed. This court has not recognized a contrary doctrine.

11. The application for the insurance states that the mortgage upon the property remains unpaid to the amount of \$400, and that the incumbrance was due in 1882. The statements of the application are warranties on the part of the assured. It was shown that there were \$440 remaining unpaid upon the mortgage, and that it matured in 1881. But the policy was issued in 1883. The court below instructed the jury, substantially, that if they should find that defendant's soliciting agent who took plaintiff's application was truly informed of the facts by plaintiff, and that the mortgage was due but she did not intend to pay it until it was foreclosed, to enable her to set up a defense as to the partial failure of consideration, the defense of the breach of the warranties cannot be supported. The instruction is assailed by counsel with a good deal of earnestness.

The knowledge possessed by the agent of the facts is chargeable to the defendant, and it will be held to have waived objection to the incorrect or false statements of the application: *Jordan vs. State Ins. Co.*, 64 Iowa, 216; s. c., 19 N. W. Rep., 917; *Boetcher vs. Hawkeye Ins. Co.*, 47 Iowa, 253; *Miller vs. Mutual Ben. Life Ins. Co.*, 31 Iowa, 216. See, also, *Stone vs. Hawkeye Ins. Co.*, 28 N. W. Rep., 47.

12. The foregoing discussion disposes of all questions arising upon rulings on instructions discussed by counsel. One or two instructions asked by defendant, which were based upon the evidence as claimed by counsel, were properly refused, as being inapplicable to the proof.

13. It is insisted that the verdict lacks the support of the evidence. We think otherwise. Upon some points, as the value of the property insured, and the like, the evidence may be meager, and not wholly satisfactory to us. But it cannot be said that there is such an absence of evidence as requires us, under the familiar rules prevailing here, to reverse the judgment.

In our opinion, the judgment of the district court ought to be affirmed.

SUPREME COURT OF IOWA.

Appeal from Des Moines District Court.

STEVENS

vs.

CITIZENS' INS. CO * }

A stipulation in a fire insurance policy, that immediate written notice of loss shall be given to the company, may be waived by an agent who has full authority to adjust the loss, although the policy provides that the company shall not be bound by the acts or declarations of its agents not contained in the policy.

The terms of an insurance policy on a building and machinery therein provided that it should become void if any other insurance policy, whether valid or not, was obtained on the same property. Another policy had been taken out previously, which stipulated to be void if the property were sold or mortgaged, if any change took place in the title, or any portion of it were removed to another location without the company's consent. Subsequently this policy was rendered void by the fact that the property was sold and mortgaged to secure the purchase price; also the machinery was removed, without the required consent, from the building in which it was when the policy was issued. *Held*, that the first-mentioned policy was not defeated by the existence of the other, since the latter had ceased to be a binding contract of insurance before the former was issued.

The plaintiff obtained from the defendant an insurance policy upon a house and machinery therein, which contained a provision that the loss or damage on the machinery should be payable to a third person who was mortgagee. Under Code Iowa, § 2,544, the plaintiff had a right to prosecute the action for the whole amount of the loss in his own name; and under section 2,683 the mortgagee had a right, as intervenor, to become a party to the action.

Plaintiff brought an action on a policy of insurance against loss and damage by fire. The property insured was a one-story, frame warehouse, and a stock of grain-cleaning and mill-wright machinery

* Decision rendered, October 23, 1886.—From *North Western Reporter*.

therein. The amount of the insurance on the building was \$25, and on the machinery it was \$975. The policy contained a provision that the loss, if any, on the machinery was payable to George H. Lane, mortgagee, as his interest might appear. The insured property was totally destroyed by fire on the 20th of October, 1883. The mortgage to Lane, which secured \$1,420, was unsatisfied when the loss occurred. The policy contains the following provisions:—

(1) When a fire has occurred injuring the property herein described, the assured * * * shall give immediate notice of loss in writing to this company.

(2) A particular statement of the loss shall be rendered to this company as soon after the fire as possible, signed and sworn to by the assured. * * *

(6) The adjusted claim under this policy shall be due and payable sixty days after the full completion by the assured of all the requirements herein contained."

(9) It is expressly provided that no suit or action against this company for recovery of any claim by virtue of this policy shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements, nor unless such suit or action shall be commenced within twelve months next after the fire shall have occurred; and, should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim.

Also the following:—

This company shall not be bound, under this policy, by any act of or statement made to or by any agent or other person which is not contained in this policy, or in any written paper above.

This policy shall become void unless consent in writing is indorsed by the company herein in each of the following instances: * * * If the assured have, or shall hereafter obtain, any other policy or agreement for insurance, whether valid or not, on the property above mentioned, or any part thereof.

On the 13th of October, after the loss, plaintiff furnished the sworn statement required by the second provision of the policy, quoted above, but he never gave the written notice of the fire required by the first provision quoted. On the first day of August, 1882, plaintiff and intervenor, who then owned the personal property covered by the policy, as partners, procured a policy of insurance thereon in the Glens Falls Insurance Company, by which it was insured against loss and damage by fire for one year from that date. The policy in suit was issued on the 16th of June, 1883.

The action was commenced by plaintiff on the 14th of May, 1884, and Lane's petition of intervention was filed January 20, 1885, in which he claimed the amount of the insurance on the machinery. The defenses pleaded are—First, the failure of plaintiff

to give the written notice of the fire required by the policy; second, that the policy was defeated because of the existence of the Glens Falls policy at the time it was issued; and third, that plaintiff, by the terms of the policy, has no claim for the amount of the insurance on the machinery, that amount being payable to Lane, and the cause of action therefor in favor of Lane was barred when his petition of intervention was filed. It was proven on the trial that the written notice of the loss required by the policy was waived after the loss occurred, by one Redfield, who was an adjusting agent for defendant, and was also the manager of its Western department. The Glens Falls policy contained the following provisions:—

(2) This policy shall be void in each of the following cases : * * * Third, if the property, or any part thereof, shall be sold, transferred, or incumbered by mortgage, judgment, or otherwise ; * * * sixth, if any change takes place in the title or occupation or possession of the insured property, or any part thereof, whether by voluntary act or otherwise.

(3) This company shall not be liable for loss or damage to any of the insured property while at or in any other location than that designated herein, without written consent in writing hereon to the removal.

And it was proven that, after the policy was given, Lane sold his interest in the property to plaintiff, and took the mortgage under which he now claims to secure the purchase price; also that the property had been removed without the consent of the insurer from the building in which it was at the time the policy was issued, to the one in which it was when destroyed. There being no controversy as to the facts, the courts directed the jury to return a verdict for the intervenor for the amount of the insurance on the machinery, and entered judgment on the verdict returned in obedience to this direction, and from that judgment both plaintiff and defendant appealed.

F. J. TRULOCK, *for Plaintiff.*

ANTROBUS & McARTHUR and POOR & BALDWIN, *for Defendant.*

GEORGE H. LANE, *for Intervenor.*

REED, J.

1. We are of the opinion that the right of action is not defeated by plaintiff's failure to give the written notice of the loss required by the policy. The agent who assumed to waive that requirement had full authority to do whatever was necessary to be done in the adjustment of the loss. He was informed of the occurrence of the fire by the local agent of the company at Burlington, and he went

to the scene of the fire for the purpose of investigating the case, and, while engaged in the investigation, he informed plaintiff and intervenor that, as he was on the ground, the written notice need not be given, but directed them to prepare and forward to him the proofs of loss, which they afterwards did; and he refused to pay the loss on the sole ground that the policy was defeated by the existence, at the time it was issued, of the Glens Falls policy. Being clothed with full authority to adjust the loss, and to do whatever might be necessary to be done in its adjustment, he necessarily had the power to determine whether the notice should be required or not, and having determined that it should not be required, and so advised the other parties who have acted upon his statement, his principal is bound by his action. It makes no difference, we think, that the policy provided that the company should not be bound by the acts or declarations of its agents not contained in the policy; for the authority to waive that provision is necessarily included in the power conferred upon him with reference to the adjustment of the loss, and he did in effect waive it. That the provision requiring the notice of the loss may be waived by the insurer is well settled by the authorities. See *Edgerly vs. Farmers' Ins. Co.*, 48 Iowa, 644; *Wood, Ins.*, 699.

2. We are also of the opinion that the policy was not defeated by the existence of the Glens Falls policy. That policy had ceased to be a binding contract of insurance before defendant's policy was issued. The sale by Lane of his interest in the property was such a change of the title as, under the provisions of the contract, avoided the policy: *Hathaway vs. State Ins. Co.*, 64 Iowa, 229; s. c. 20 N. W. Rep., 164. Perhaps it could be said that the change of title had the effect only to render the policy voidable at the election of the insurer, and that, under the peculiar provision in defendant's policy, which is against other contracts of insurance, whether valid or not, the contract was defeated. But, however that may be, we are of the opinion that, under the provision of the Glens Falls policy against the removal of the property, all liability of that company terminated when the property was removed from the building in which it was situated when the policy was issued. It was expressly provided that the company should not be liable for loss or damage when the property was at any other place or location than that designated in the policy. The removal of the property to another building, without the consent of the company, did not have the effect simply to render the policy voidable at its election; but, by

the express terms of the provision, its liability for the risk was terminated by that act. When, therefore, defendant's policy was issued, there was no other contract of insurance in existence; the policy of the other company was as certainly terminated by that act as it would have been by the expiration of the time for which it was given.

3. The policy in suit is a contract between plaintiff and defendant. The provision, however, that the loss or damage on the machinery should be paid to the intervenor as his interest might appear, was for intervenor's benefit. Section 2,544 of the Code provides that a party with whom or in whose name a contract is made for the benefit of another may sue in his own name without joining with him the party for whose benefit the suit is prosecuted. Under this provision it was very clear, we think, that plaintiff had the right to prosecute the action in his own name for the recovery of the whole amount of the loss. The court possessed ample power, upon a showing of intervenor's interest, either by plaintiff or defendant, to enter such judgment in the case as would have fully protected the rights of all the parties. If the presence of intervenor had been deemed necessary to the determination of the controversy, the court had the power, under section 2,557, to order him to be brought in. The action instituted by plaintiff was for the recovery of the whole loss; and, as we think, was properly brought in his own name. The intervenor, however, had an interest in the matter in litigation, and he had the right, under section 2,683, to become a party to the action. That section provides that "any person who has an interest in the matter in litigation in the success of either of the parties to the action, or against both, may become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the cause, and before the trial commences."

It was under this provision that intervenor became a party to the suit. He did not institute a new action, but became simply a party to the one pending between plaintiff and defendant. Nor did he make any demand independent of the matter in litigation between them, but asked only that the recovery for that portion of the loss which, by the terms of the contract sued on, was payable to him, should be for his benefit. The policy provides that no action for

the recovery of any claim shall be maintainable, unless commenced within twelve months after the occurrence of the fire. Clearly, we think, this does not preclude the intervenor from becoming a party to an action which was properly brought within that time, and asserting any interest he may have in the subject-matter of the action.

Upon the undisputed facts of the case, we think the direction of the court was right, and the judgment will be affirmed.

SUPREME COURT OF PENNSYLVANIA.

Error to the Court of Common Pleas of Montgomery County.

MUTUAL FIRE INSURANCE CO. OF MONT-
GOMERY CO., PENN.,

vs.

DE HAVEN.*

B., an insurance company, included in a policy issued by it to C. an insurance upon "stock, crops, and farming implements; during the running of the policy a field of growing wheat belonging to C. was in part destroyed by a hailstorm; he presented a claim to B. for payment on account of his loss, which B. declined to pay, as the crop destroyed was a standing one; he then brought suit against B. *Held*, that he could recover.

De Haven was the holder of a policy of insurance in the Mutual Fire Insurance Company of Montgomery County, Penn., issued March 14, 1881. The company also insured by virtue of supplemental act passed February 14, A. D. 1867, against losses by storms or hurricanes. A clause in the policy held by De Haven was as follows: "Stock, crops, and farming implements, \$1,200."

There was a hailstorm on the 22d of May, 1883, and a field of standing and growing wheat was partially destroyed. De Haven demanded payment of the company for his loss; the company denied that he had any insurance on growing crops. De Haven sued for this loss, and the court held that the word "crops" included growing crops. From this decision and judgment a writ of error was taken.

* Decision rendered, May 3, 1886.—From *Eastern Reporter*.

CHARLES HUNSIKER, *for Plaintiff in error.*

The constitution of this company contains the following clause :—

§ 5. The president and managers shall have full power, on behalf of said corporation, to make insurance against losses by fire, on any house, tenement, manufactory, barn, or other buildings, and goods, wares, merchandise, and effects, and household furniture therein, and on hay, grain, and other agricultural products, in barns, stacks, or otherwise, and generally on all kinds of goods, wares, merchandise and effects (except books of accounts, bills, bonds, ready money, jewels, plate, paintings, engravings, and large manufactories), to make, execute, and perfect such and so many contracts, bargains, agreements, policies, and other instruments as shall or may be necessary, and as the nature of the case shall or may require; and every such contract, agreement and policy to be made by the said corporation, signed by the president and attested and signed by the secretary, and also shall be signed by the party insured; and the president and managers are hereby empowered to have made, and to procure a seal with such device as they may deem proper, to be used by them as the common official seal of the company.

Our contention is, that the words "on hay, grain, and other agricultural products, in barns, stacks, or otherwise," means on all gathered products, not on growing grain, potatoes, or anything not cut or gathered. The learned judge below held that the word "crops," written in the policy, and the words "and other agricultural products in barns, stacks, or otherwise," in the constitution, was wide enough to cover growing crops. There is no positive decision of the supreme court covering this exact point, but we contend that a fair construction of the whole clause would limit the crops insured to a crop gathered, for the insurance is "on hay, grain, and other agricultural products in barns, stacks, or otherwise." The word "otherwise" means some method of a similar kind as in "barns or stacks." In the case of *Bucher vs. Com.* (7 Out., 528) the court held that the words "other persons," following in a statute the words "warehousemen" and "wharfinger," must be understood to refer to other persons ejusdem generis, viz.: those who are engaged in a like business or who connect the business of warehousemen, etc., with some other pursuit. The very meaning of "crop," as defined by lexicographers, means anything cut off or gathered. Webster defines it in his dictionary of 1880 as that which is "cropped, cut, gathered," etc., and that was the meaning as it was understood, in connection with the section 5 of constitution of company above quoted, viz.: "Hay, grain, and other agricultural products in barns, stacks, or otherwise." The learned judge admitted that had not the word "otherwise" been added, the plaintiff would have had no standing.

Hay is not hay whilst it is grass ; the grass must be cut and dried before it is hay. Again, an agricultural "product" is not produced until it is "gathered, cut, or garnered." Taking all the words together, and the whole scope of the case, all the implications are against the construction put by the court.

H. B. DICKINSON and GEORGE N. CORSON, *for Defendant in error.*

Judge Boyer cites the definitions from Webster, that we used on the trial, and others, in his opinion overruling the motion for a new trial, and, therefore, we adopt and print his opinion as our best argument.

"The plaintiff effected an insurance of his crops from loss by fire or storm in the defendant company. He suffered a loss by a hail-storm beating down his grain growing in the field. The defendants set up the defense that the insurance did not cover the grain whilst still growing, but only grain already harvested. This was the only contention upon the trial.

"The charter under which the defendant corporation was originally incorporated authorized insurances against fire only ; but by a supplemental act of Assembly, approved February 14, 1867, the company was authorized to insure against losses by 'storms and hurricanes,' under the same rules and regulations, and with the same force and effect and with respect to the same species of property as was theretofore insured against loss by fire. And the second section of said act provided that all existing and outstanding policies of insurance issued by said corporation shall be deemed and considered as insuring holders thereof against losses by storm or hurricane (as well as by fire) in respect to the property and effects mentioned and referred to in the said policies, with the like force and effect as though the act to which this is a supplement had authorized such insurance, and such losses by storms or hurricanes had been specially covered by said policies. The charter—section 5—provides for insurances on 'hay, grain, and other agricultural products in barns, stacks, or otherwise.'

"Where, therefore, 'crops' are insured in general terms, as in this policy, it must be taken to include all which in the common and appropriate use of language is comprehended under that description. In the latest dictionary, published in 1880, a 'crop' is defined as 'the top end or highest part of anything, especially of a plant ; also that which is cropped, cut, or gathered, from a single field, or of a single kind of grain or fruit, or in a single season ; especially the valuable

product of what is planted in the earth ; fruit ; harvest.' In the edition published in 1856, crop is also defined as 'corn and other cultivated plants while growing—a popular use of the word.' Though this latter definition has been omitted from the later editions of Webster, the Imperial Dictionary, lately revised and published in four volumes, in London and New York, repeats the definition as to growing crops above quoted, viz. : 'corn and other cultivated plants while growing—a popular use of the word.' As applied to agriculture the most general definition of crop seems to include that part of any agricultural product which is susceptible of being cropped for the uses of husbandry, whether already gathered or progressing toward maturity for that purpose.

"After all, what is included under the general name of 'crops' is to be determined by the sense in which it is ordinarily used or may be reasonably understood in the connection in which it happens to be placed, rather than by nice philological distinctions derived from its original roots. It is certainly common to speak of the fruits of the earth as 'crops' whilst still growing in the fields unharvested.

"'The condition of the crops' is a familiar newspaper heading for a description of wheat, rye, corn, and oats whilst still growing in the fields unharvested. So 'crops' in the ground or 'growing crops' is a familiar expression in popular use and often advertised to be sold by that designation.

"The fifth section of the act incorporating the defendants enumerated among insurable property, 'grain or other agricultural products in barns, stacks, or otherwise.' Clearly showing that grain and other agricultural products were insurable when not gathered into barns or stacks, but also otherwise. 'Otherwise' is a largely embracing word, and would seem to comprehend every situation in which grain might exist. Whilst growing in the field it was already an 'agricultural product,' although not yet matured. If still unharvested it was more liable to damage by storm, and therefore, the more desirable to be insured against such accident. When gathered and stored in barns and stacks there would be comparatively little danger from storms.

"The whole question turns upon whether or not grain growing in the field may in any reasonable and accepted sense be described as a 'crop.' If it has been shown that the terms by general usage are applicable both to grain gathered and grain growing, it is decisive of the question in favor of the insured. It is well settled that where an insurer introduces an expression having two meanings, one larger

in its signification and the other more limited, he cannot, after an acceptance of the policy by the other contracting party, set up the narrower construction. And where a general name is used it is to be interpreted in the most enlarged sense. It is the insurer's own language and must be interpreted most favorable to the insured. See Whart. Law of Contr., § 40, page 670; West Ins. Co. vs. Cropper, 32 Penn. St., 186; Franklin Ins. Co. vs. Brook, 57 id., 74; Marvin vs. Stone, 12 Cow., 806; Raum vs. Ins. Co., 59 N. Y., 389; Allen vs. Ins. Co., 85 id., 473.

"Under this view we are of opinion that the crops of the plaintiff growing in the field were covered by his policy, and that his recovery was proper.

"And now, June 29, 1885, the motion for a new trial overruled by the court."

In 104 Penn. St., 281, Chief Justice Mercur says: "Corn and potatoes were then growing on it;" "When these crops were planted," etc., showing that the best lexicographers are affirmed by our supreme court in the common-sense acceptation of the word "crops." And as Mr. Justice Paxson says, of the word "passenger," in 96 Penn. St. 265, "crops" "must be understood in its ordinary and popular signification," as also Judge Boyer has said, following Noah Webster. A farmer who has a good stone barn would scarcely take an insurance against storm on his crops after they are carefully stored away in the mow. He only needs the insurance on them when they are exposed to storm in the field, or to fire in the barn.

PER CURIAM.

The property insured is described as "stock, crops, and farming implements." The precise location or condition of any one is not described. The company is authorized to make insurance against losses by storms and hurricanes on hay, grain, and other agricultural products, "in barns, stacks, or otherwise."

It had an undoubted power to insure the articles of property specified, whether they were in the fields or housed in barns. Crops are more exposed to storms and hurricanes while growing in the field than after they are put in stacks or barns. The language in the policy is broad enough to cover growing crops. Such we think was the manifest intent of the parties to this insurance.

Judgment affirmed.

SUPREME COURT OF IOWA.

Appeal from Decatur District Court.

LAMB, AND OTHERS, INTERVENORS,

vs.

COUNCIL BLUFFS INS. CO.*

In an action by a policy-holder against a fire insurance company, to recover for a loss, the appellate court, on appeal by the defendant, will not notice an error in the judgment of the court below in passing upon the rights of an assignee of the plaintiff who intervened in the action as a co-plaintiff, but has not appealed.

A fire insurance company, in defense of a claim for loss under a policy, cannot maintain that the plaintiff's answer in his application was false in stating that the house insured was "built" at a certain date, on the ground that it was then built partly out of materials from an old house pulled down, and that the words "when built" refer only to buildings constructed entirely of new material; and the court will exclude evidence as to the meaning of the word "built" among insurance men.

Where a policy of insurance against fire contains a provision that, unless otherwise expressed in the policy, the assured is understood to be the sole owner in fee-simple of the land upon which the buildings insured stand, and has indorsed upon it a copy of the application, which, by a clause in the policy, is made a part thereof, showing that the assured holds only under a contract for sale, the insurance company cannot maintain, in defense to a claim under the policy, that it was void, when issued, for breach of the condition as to a fee-simple ownership, but will be held to have waived such condition.

Where the only statement of a policy-holder in making proofs of his loss, and of the party entitled, was as follows: "Amount claimed of [company, so much]. The property insured belonged exclusively to J. F. Lamb [his name]," and it is shown that he had previously transferred a portion of his claim—the court will not hold this to be "a fraud, or attempt at fraud," or "false swearing," to, or in relation to, the proofs of loss, such as, by a condition of the policy, will render it void.

A voluntary assignment of a portion of his claim against an insurance company by the assured, which has not been accepted by the assignee, does

*Decision rendered, December 10, 1886.—From *Northwestern Reporter*.

not disentitle the assured to his claim, but he is entitled, notwithstanding such assignment, to recover the full amount of the loss.

A contract for sale of lands for a price payable by installments, which contains a proviso that, in case of non-payment of an installment for 60 days after it becomes due, the whole amount unpaid on the contract shall become due and payable, and the contract be no longer binding on the obligor, and an agreement to sell the land to the purchaser, and to convey same to him upon payment of the purchase money, amounts to a conditional sale, with an agreement to convey, and vests an equitable title in the purchaser, and cannot be held to be a mere lease.

Action on a policy of insurance against loss or damage by fire. The defenses pleaded and relied on are sufficiently referred to in the opinion. Trial by jury. Judgment for plaintiff, and defendant appeals.

SAPP & PUSEY and C. C. McINTIRE, *for Appellant.*
YOUNG & PARISH, *for Appellee.*

SEEVERS, J.

To the petition of intervention of Bowersock, the defendant demurred on the ground that the action, as to him, was barred by the statute of limitations. The demurrer was overruled. The court also gave certain instructions bearing on the issue between him, the plaintiff, and defendant, which the latter claims to be erroneous. The jury found that the plaintiff was entitled to recover the whole amount of the loss, and therefore found against Bowersock's right to recover. Now, it seems to us to be wholly immaterial as far as the defendant is concerned, whether the court erred or not in the above-mentioned respect. Bowersock has not appealed, and the defendant and plaintiff both have succeeded in defeating him, and, clearly, we could not reverse the plaintiff's judgment, even if the court did err as between him and the defendant.

2. The policy contains this provision: "It being understood, unless otherwise expressed in this policy, that the interest of the assured is the entire, unconditional, and sole ownership of the property; and that all buildings intended to be insured by this policy stand on ground owned in fee-simple by the assured." There was a copy of the application on the back of the policy, and it is stated in the policy that the terms and stipulations thereof are hereby declared to be a part of this contract, "and are to be resorted to in order to determine the rights and obligations of the parties hereto." The property insured consisted of a frame building, and a stock of merchandise therein.

The assured answered certain questions contained in the application as to his title, and the character thereof, as follows: "Title. Were you the sole and undisputed owner of the property proposed

for insurance? Yes. Nature of title. Have contract with town company; only part paid." The defendant insists that the policy became void and of no effect for the reason that the assured was not the sole owner in fee-simple of the property insured. It is obvious that the answers to the foregoing questions, separately considered, are inconsistent; and it further clearly appears that the assured did not own a fee-simple title. But assuming, for the present, that the assured correctly stated his title in the application, and the company, with full knowledge, accepted and assumed the risk, it should not now be permitted to say that the policy was void when issued. The defendant knew when it issued the policy that the assured did not own the fee-simple title to the real estate, and it knew precisely what title he had, and, so knowing, issued the policy. If there was a false statement, the defendant so knew, and must be held to have waived the conditions of the policy in this respect. It is said, however, that the false statement is not contained in the policy, and therefore, because of the terms of the policy, the defendant cannot be said to have waived its conditions. But the application is made a part of the policy in the same sense as if it was set out at length on the face thereof, and the defendant is bound thereby.

3. The building destroyed was situate on lot No. 24, in block 19, in the town of Grand River. This lot was purchased by Laura A. Lamb, and the contract referred to in the application was executed to her in August, 1883. A small part of the consideration was paid in cash, and the first deferred payment became due in February, 1884, and it had not been paid when the loss occurred, which was more than 60 days after it became due. The contract provides that, in case of non-payment of "any payment * * * for the space of sixty days after the same shall become due, then, and in that case, the whole amount unpaid on this contract shall become due and payable without further notice, and the contract will be no longer binding on the obligor. The obligor therein agrees to sell and convey to Laura A. Lamb the lot above mentioned, and to convey the same to her upon the payment of the purchase money." It is said that, under this contract, Laura A. Lamb did not obtain any title whatever, or, as we understand counsel, any greater interest thereto than the right to its use and occupancy. We, however, think the contract amounted to a conditional sale, with an agreement to convey, and vested in Laura A. Lamb an equitable title. The contract amounts to more than a simple lease, and it must be either that or a conditional sale. However this may be, the assured simply stated that he held under

a contract, and so he did. Laura A. Lamb had assigned her right to him, and therefore he made no false representation as to the title. In this connection it is proper to say that plaintiff did not make any false statement in the proofs of loss, as to the title, with intent to deceive or defraud the company.

4. In the application the assured was asked when the building was "built." He answered, "In 1883." The evidence shows that there was a building at some other place, which was torn down, and the material used, together with certain new material, in the construction of the building insured. The statement in the application, therefore, is literally correct. The building insured was "built" in 1883, but both new and old material was used in constructing it. But the appellant contends that in "insurance parlance, and in the business of insurance, the words 'when built' refer only to a building constructed entirely from new material," and the appellant sought to introduce evidence to establish such fact, but the court, as we think rightly, excluded it. It was not proposed to show that the assured had any knowledge of the fact proposed to be established. All he was bound to do was to answer the questions asked him correctly. If he had been asked whether the building was constructed of new or old material, it must be assumed he would have answered according to the fact.

5. The loss occurred on the nineteenth day of May, 1884, and on the same day the assured, on his own motion, signed a writing in these words: "For value received I hereby transfer and assign to J. D. Bowersock * * * the sum of three hundred and twenty-two dollars in a certain insurance policy issued" by the defendant, thereby referring to and meaning the policy upon which this action is based. The policy provides that "any fraud," or "attempt at fraud," or "false swearing," to, or in relation to, the proofs of loss, renders the policy void; and it is pleaded that in making the proofs of loss, and in swearing thereto, the assured claimed that the whole amount of the loss was due and payable to him, and did not inform the defendant that he had made the assignment above stated. It is not pleaded as a defense that the proofs of loss are not sufficient, and that for this reason the defendant is not liable, but that the proofs are incorrect and false in the particular just stated. The proofs of loss do not state that the whole amount of the loss is due and payable to the assured, and in this particular the proofs may, under the terms of the policy, have been deficient in this respect. But no objection was made thereto, nor, as we have said, was such insufficiency

pleaded as a defense. The only statement in the proofs of loss bearing on the question as to whom the loss was due and payable is the following: "Amount claimed by the Council Bluffs Insurance Company of Council Bluffs, Iowa, \$1,450. The property insured belonged exclusively to J. P. Lamb." The last statement is literally correct, and we cannot, as a matter of law, say that the assured swore falsely in swearing to the proofs of loss, or that he thereby intended or attempted to defraud the company; for he does not state that the amount claimed is due and payable to him, but simply that he claims there is due on the policy the sum above mentioned.

Besides this, the plaintiff claims that the assignment to Bowersock was a voluntary act on his part, and that it had never been accepted by Bowersock, or, if it ever was, that the assured did not have knowledge of such acceptance at the time he made out the proofs of loss; and this issue, under proper instructions, was submitted to the jury, and this issue must have been found for the plaintiff. It is quite clear, we think, that the assured could not vest an interest in the policy in Bowersock without his consent or knowledge. Unless Bowersock accepted the assignment, it amounted to nothing, and was without force or effect, and plaintiff was entitled to the full amount of the loss, and he had the undoubted right to so state and claim. What we have said as to Bowersock applies with full, if not greater, force to the other intervenors, Harnell & Co.

6. The court, in substance, charged the jury that "fraud will never be presumed, but must be proved. Still, fraud, like any other fact, may be proved by showing facts and circumstances from which the inference is natural." If we understand counsel, this instruction is not objected to as being abstractly incorrect, but that it is not applicable to the facts in this case. In this we do not concur, and what we have said heretofore sufficiently expresses our views as to the question of fraud arising in the case.

It is insisted that the third instruction asked should have been given, but we think the charge of the court covers, substantially, the same ground, and therefore there was no error in refusing the instruction asked.

The jury found for the plaintiff, and judgment was accordingly entered; but the court found that Bowersock, and Harnell & Co., the intervenors, were entitled to an interest therein, and directed that the clerk, when the money came into his hands, should pay certain amounts to them. This disposition of the fund or judgment must have been made with the consent of the plaintiff. If not, we can readily

see that he would have serious grounds to complain; but we are unable to see how the defendant is in any way prejudicially affected by the order made by the court.

We have endeavored to consider what we regard as the material questions argued by counsel, but, as the number of errors assigned is unusually large, it is possible that some of the minor errors which we do not think were prejudicial are not referred to. **Affirmed.**

SUPREME COURT OF ILLINOIS.

Error to the Appellate Court of the Fourth District.

GRANGE MILL CO.

vs.

WESTERN ASSURANCE CO. ET AL.*

The property, according to the evidence, was insured by the vendor for the benefit of the vendee.

Held, That as between the vendor and vendee, the insurance money in case of the destruction of the property represents the property itself, and in equity should be appropriated to the vendor to the extent of his interest in case of insolvency of the vendee.

Where the companies had knowledge of the claims of the vendor and stipulated in settlement with the vendee in a compromise in which they claimed that there was no legal liability, that in the event of further litigation they were not to be affected by the payment; they paid the vendor at their peril, having notice of the adverse claim.

Where all the essential elements of the policies were admitted in the answer of the companies, it was unnecessary to introduce the policies in evidence.

A refusal to pay on the ground of no title to the property is a waiver of proofs.

Where part of the purchase money was paid by the vendee in possession, it cannot be alleged that he has no title.

SCOTT, C. J.

The original bill in this case was brought by the Grange Mill Company, in the Circuit Court of Union County, against certain insurance companies, and John T. Emison and Lee Musselman. It is alleged complainant sold its mill property to defendant Emison, at a certain price, a part of which was paid in cash, and the remainder was to be secured to be paid by his promissory note, with interest.

* Decision rendered, November 10, 1886.

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The negotiations for the sale of the property seem to have been conducted by a real estate agent, and the contract agreed upon, whatever it may have been, was never fully complied with by Emison. It seems he refused to execute his note for the unpaid balance of the purchase money, and refused to accept the bond for a deed that was drawn up for delivery. Notwithstanding his refusal to execute the papers prepared, Emison did take immediate and exclusive possession of the mill property, which was surrendered to him by the company under the alleged contract, and perhaps commenced to operate it. Afterward, Emison associated with him one Lee Musselman, and thereafter carried on business under the name of John T. Musselman & Co. The alleged contract of sale was made in October, 1880. Shortly after Emison & Co. began to operate the mill, they procured insurance upon it for their own benefit from the defendant insurance companies, amounting in the aggregate to the sum of \$5,000. In June, 1881, the mill property was totally destroyed by fire. No further sum had then been paid on the purchase price of the property. Suits had been commenced by Emison & Co. against the several insurance companies to recover for the loss sustained. Pending those suits this bill was filed, in which the insolvency of Emison & Co. was alleged, and by which complainant claimed the benefit of the insurance under an alleged contract made with Emison at the time of the sale of the property to him, to have it insured for its benefit. To the bill the several insurance companies were made defendants with Emison and Musselman.

A summons was issued for the defendant companies on the 7th day of November, 1881, and an effort was made to obtain service. Other process was subsequently issued, and such service was had that the defendant companies came into court and defended. An amended bill was filed in which it was alleged that Emison & Co. recovered judgment in the actions on the policies against the several companies, which judgments, while appeals were pending in the appellate court were in some way settled by the payment to Emison & Co. the sum of \$2,500, each company paying a sum in proportion to the amount of its risk.

On the answers filed by the several defendant companies and the replication thereto, and upon the evidence, both documentary and oral, the cause was heard in the circuit court, and the bill was dismissed for want of equity. That decree was afterwards affirmed in the appellate court of the fourth district, and complainant brings the cause to this court.

The bill is framed on the theory, Emison agreed at the time of the sale, and as a part of the contract that he would have the property insured for the benefit of complainant. The evidence contained in this record has been subjected to a careful consideration, and it is thought it fully sustains the position taken that Emison did agree to have the mill property insured for the benefit of his vendor. It is so expressed in a written memorandum made at the time, and that memorandum was given in evidence by plaintiffs in the trial of the case of Emison & Co. vs. Traders' Ins. Co. That was evidence tending to show there was a contract that insurance should be procured. But, aside from the written memorandum, the agreement to procure insurance upon the property for the benefit of complainant is fully established by other testimony. Undoubtedly the law is that, as between the vendee and the vendor, the insurance money in case of the destruction of the property, represents the property itself, and in equity the insurance money should be appropriated to the vendor in case of the insolvency of the vendee.

The principle is of frequent application where a mortgagor or vendee agrees to insure for the benefit of the mortgagee or vendor in case of loss, in equity such party is entitled to the insurance money to the extent, at least, of his interest in the property which was the subject of insurance. After notice to the insurance company having the risk, such company cannot pay the loss to the assured named in the policy, except at its peril, until the rights of the parties claiming the fund shall have been adjusted. Cases in this State and elsewhere recognize this equitable doctrine : *Phoenix Ins. Co. vs. Mitchell*, 67 Ill., 43; *Cromwell vs. Brooklyn F. Ins. Co.*, 44 N. Y., 42; *Wheeler vs. Ins. Co.*, 101 U. S., 439.

The general doctrine on this subject is not questioned, but the defense is rested mainly on two grounds, (1) that prior to making the compromise or settlement as was done with the assured, the insurance companies had no notice of the claim now insisted upon by complainants; and (2) that the policies were, for some reason, not obligatory on the companies issuing them, and for that reason they were under no legal liability to pay the losses to the assured. It follows, as a matter of course, if the companies were under no obligation to pay the losses to the assured, there could be no obligation to pay complainant. It appears from the acquaintance taken from *Emison & Co.* on payment of the sums agreed upon by way of compromise or otherwise, that the companies each had actual notice before anything was paid to Emison & Co. of the equities of

complainant, for in it they provided in the "event of any further litigation by the Grange Mill Co.," neither company was to be affected by the payment of the sums of money paid or otherwise. To what further litigation "further litigation" is the reference? Obviously to further litigation on the present bill then pending. There was then no further litigation pending anywhere, or in any court that could affect the parties in regard to the matters they were contracting about. In case the litigation then pending should be continued by complainant in this suit, it was agreed neither defendant should be affected by what was done by the parties to the settlement they were making. If it had no reference to complainant's bill, then there was nothing to which it could by any possibility refer. Conceding, then, as must be done, the reference is to the present bill, it is conclusive as to the actual knowledge of defendants of the equities of complaint. The fact of notice is therefore fully proved, and if they paid anything to Emison & Co. on the policies it was wrongful, and at the risk of the companies paying it.

Passing now to consider the second question made on the defense, it is seen it is the most important question discussed. It is whether the evidence contained in this record shows a *prima facie* right to relief in favor of complainant. It is thought it does. It is made a ground of objection, the policies issued by the insurance companies were not introduced in evidence. Under the pleadings it was not necessary. The making of the policies by the several companies, the amount of risk carried by each, and for whose benefit made, were all facts distinctly admitted by defendants insurance companies in their joint and several answers. It was wholly unnecessary, therefore, to prove that which was solemnly admitted by the answer, and the practice does not require it. The destruction of the mill property by fire is also admitted in the answer of defendant, and proof of that fact was unnecessary.

It is said there is no proof of loss given by the assured. That fact was waived by the companies placing their refusal to pay the losses on the sole ground the assured had no title to the property destroyed. The evidence in this record shows the refusal to pay the loss was for the reason the insured had no insurable interest in the property. That they had such an interest appears, past all doubt, from the evidence in this record. Emison had bought the property, had made partial payment, and was in possession under his contract at the time the policies were written. He and his partner that he had taken in with him were the equitable owners of the property in-

sured at the time, and had they paid the balance of the purchase money they would have been entitled to a deed. These facts when established, either by admission or proof, were prima facie sufficient to warrant the relief demanded by complainant. Of course, the prima facie case thus made is liable to be defeated. If the representations made in the application were untrue and false, then there would be a breach of the warranty implied in every application for insurance, and the policies would be void. That, however, is a matter of defense. It was not necessary for complainant to introduce the application, and prove the representations it contained were correct. That proof should come from defendants if they or either of them insisted they had been overreached in writing the policies. The defendants made no such proof, nor did they ever charge the assured with any actual fraud in obtaining the policies. The insistence by the defendants has all the time been that the policies were void because the assured had no title to the property. It may be, when the companies come to make their defense, it will appear the assured represented their insurable interest in the property correctly. How that may be cannot be known until the defense shall be unfolded.

The judgment of the appellate and the decree of the circuit court will be reversed, and the cause remanded to the circuit court for further proceedings not inconsistent with this opinion.

SUPREME COURT OF APPEALS OF VIRGINIA.

Appeal from the Chancery Court of Richmond.

CABELL & McGUIRE

vs.

SOUTHERN MUT. INS. CO.*

The So. Mut Ins. Co. conveyed to C. & McG. all its assets in trust for its creditors, and the trustees brought suit against the company and its mutual policy-holders, asking that assessments be made upon the "deposit notes" of the policy-holders to pay the creditors; the several claims against the numerous defendants were less than \$500, but the aggregate of the claims of the plaintiffs exceeded that sum. *Held* :—

1. The aggregate of all the claims is the plaintiffs' demand against all the defendants; it is the matter in controversy, and this court has jurisdiction upon appeal by the plaintiffs.
2. The trustees represent the insured creditors, whose debts exceed the jurisdictional sum, and upon this ground also the court has jurisdiction.

Policy-holders in the So. Mut. Ins. Co., in pursuance of its charter, gave premium or deposit notes conditioned to be "paid at such time or times, and in such sum or sums, as the directors may require to pay the expenses and losses of the company;" the company suspended business and conveyed its assets to trustees for benefit of its creditors; in suit by the trustees to assess the deposit notes of the policy-holders whose policies had not expired at the date of suspension, to pay creditors.

Held, The deposit notes are liable to be assessed for all loss incurred before the expiration of the policies, and the assessments may be made after the expiration of the policies.

The Southern Mutual Insurance Company was chartered in 1868, with "power to make insurances of any kind in the fire, marine, tornado, or life line, on the mutual and cash plan." The fourth section of its charter gave it "power to receive premium or deposit notes from those who effected insurances, which shall be paid at such time or times, and in such sum or sums, as the directors may require to pay the expenses and losses of the company." The fifth section pro-

* Decision rendered, May 6th, 1886.—From *Virginia Law Journal*.

vided that if any member should fail to pay any assessment for thirty days after written notice, the company might bring suit to recover the whole of the premium note, &c. The company confined itself to fire insurance, and policies on the mutual plan were issued for the term of five years. The deposit notes which were taken conformed in terms strictly to the fourth section of the charter, cited above. The company did business for eight years, and then, becoming insolvent, retired on September 30th, 1876, and conveyed all its assets to J. G. Cabell and Hunter McGuire in trust for its creditors; the assets consisted almost exclusively of deposit notes, about twenty-five per cent of the face amount of each of which had not been assessed for by the directors.

In 1877 the trustees filed their bill in chancery court against the company and those of its mutual policy-holders whose policies had not expired before October 1st, 1876, but had been and were then expiring, asking that a call or calls for the unpaid portion of the deposit notes might be made by the court. Many of the defendants appeared and set up, among others, the defense of forfeiture and parol representations, which were finally overruled by the then chancellor, Judge Fitzhugh, and a call ordered as prayed for, on March 6th, 1880. A dividend being paid disclosed the fact that the proceedings on the original bill had failed to pay the debts in full, and a report having been made showing the dates at which the several debts and liabilities accrued, an amended and supplemental bill was filed, bringing in the mutual policy-holders who had not been included in the original bill. The cause was then referred to a commissioner to inquire which of the mutual policy-holders were then liable to assessment on their deposit notes, the amount for which each was liable, and the amount which should be called for from each in order to pay the debts, etc. Upon the coming in of this report, and depositions taken, etc., the case was heard by Judge W. S. Barton, sitting for Judge A. L. Holladay, the then chancellor (who had been counsel in the case), who dismissed the amended bill on the ground that no assessment could be made on the deposit notes after the expiration of the policies. And from this decree the plaintiffs appealed.

HARRISON & BARWELL, *for Appellant.*

JOHN B. YOUNG & J. SAM'L PARRISH, *for Appellees.*

LACY, J.

The first question raised here is as to the jurisdiction of the court. The aggregate of the claims of the plaintiffs, the appellants here, exceeds the sum of \$500. Each claim against the numerous defendants

is less than that sum. The aggregate of all the claims is the plaintiffs' demand against all the defendants. This is the matter in controversy, and the right of the plaintiff to appeal when his bill is dismissed is clear: *Winchester and Strasburg R. R. Co. vs. Colfelt*, 27 Gratt., 780; *Gage vs. Crockett*, 27 Gratt., 736; *Campbell vs. Smith*, 32 Gratt., 290; *McCrowell vs. Burson*, 79 Va., 301, 302, and cases cited in the opinion of Richardson, J. In this case the trustees represent the insured creditors, whose debts exceed the jurisdictional sum, and upon that ground also the jurisdiction is maintained: *Atkinson vs. McCormick*, 76 Va., 798.

The plaintiffs in the chancery court claimed the right to assess the policy-holders on their deposit notes, after the expiration of their policies, provided the losses or expenses assessed for occurred before the expiration of the policies. The defendants, the policy-holders, admit their liability for losses, etc., incurred before the expiration of their policies, but they deny the right of the company to assess them therefor after the expiration of their policies. They claim that their liability to charge and their liability to be assessed for such losses ends with the expiration of their policies.

The plaintiffs admit that they cannot be charged for losses which occurred after the expiration of their policies, but maintain the right to assess them after the expiration of their policies for losses incurred before the policy expired. The plan was mutual, and the charter provided that the deposit notes should be paid at such time or times, and in such sum or sums, as the directors might require, to pay the expenses and losses of the company; and also gave power to the directors to fix the amount to be paid in cash at the time of effecting the insurance. The utmost extent of the insured's liability was his deposit note; the degree to which that was to be enforced against him was his assessed, ratable share of such expenses and losses as should be incurred by the company during the life of his policy. His liability thus ascertained was to be paid by him "at such time or times, and in such sum or sums, as the directors might require," for the stated purposes.

If the insured admits that this charge is upon him, upon what can he contend that the right to assess his note ceases before the charge has been satisfied? If he is liable for losses incurred during the life of his policy, upon what sound reason can be found a distinction between a loss occurring the last day of his period of liability and such as may occur the first day? Yet, if his contention is sound, he is bound for the latter, but has escaped the former altogether. Obvious-

ly, losses cannot be assessed for until they are known and proved, and the question here is not when they became known, but when they occurred. If they occurred during the time when he was bound, then the assessment cannot be avoided. There is no limitation to be found in the policy, and there is none in reason, which will sustain the contention of the defendant below, the appellee here. After having bound himself to contribute, he cannot be discharged from the obligation he has assumed until the contribution has been actually made, or the obligation in some lawful way extinguished: *Hawley vs. Upton*, 102 U. S. C. R.; *Upton vs. Tribetcock*, 91 U. S., 45; *Webster vs. Upton*, id., 65; *Smith vs. Saratoga Co. Mutual Ins. Co.*, 3 Hill, 512; *Swamscott Machine Co. vs. Partridge*, 5 Foster, 373; *Jackson, Receiver, vs. Roberts*, 31 N. Y., 304; *Sand, &c., vs. Saunders*, 28 N. Y., 416; *People's Fire Ins. Co. vs. Hartshorne Co.*, 90 Penn St., 470; *Aikers vs. Hita*, 94 Penn. St., 398; *Fayette Mut. Ins. Co. vs. Fuller*, 8 Allen, 27; *Atlantic Ins. Co. vs. Goodall*, 35 N. H., 336.

The chancery court held that the right to assess ended with the life of the policy, although the losses occurred prior to the end of the policy, and dismissed the plaintiffs' bill. This was plainly erroneous, and the said decree must be reversed, and the cause remanded to the said court for further proceedings to be had therein as prayed in the plaintiffs' amended bill. Decree Reversed.

Fauntleroy, J., dissents.

SUPREME COURT OF APPEALS OF VIRGINIA.

Error to the Circuit Court of Fauquier County.

VIRGINIA F. AND M. INS. CO.)

vs.)

AIKEN.)

A condition in a policy of insurance, that no suit shall be brought upon the policy unless commenced within a stipulated time, less than the period prescribed by the statute of limitations, is valid and enforceable.

A policy of insurance contained a condition that no suit should be maintained upon the policy unless brought within six months from the day upon which the loss occurred; loss occurred on August 18th, 1884, and on February 11th, 1885, when seven days of six months remained, the insurance company indorsed upon the policy the following: "The provision in this policy limiting the time within which suit may be brought against this company under it, is hereby waived for thirty days from this date," suit was brought on March 16th, 1885, six months and twenty-six days after the loss.

Held, The effect of the company's waiver was to suspend for thirty days the provision limiting the time for suit, so that the six months' limitation ceased to run for thirty days and began to run again at the expiration of that time, when seven days of the six months remained; the suit, having been brought within those seven days, is in time.

BARTON & BOYD, for Plaintiff in Error.

H. CONRAD, for Defendant in Error.

LEWIS, P. (after stating the case.)

This was an action of assumpsit against the Virginia Fire and Marine Insurance Company on a policy of fire insurance, for the sum of twenty-five hundred dollars. The defendant in error was the plaintiff below. The alleged loss occurred on the 18th of

*Decision rendered, September 30, 1886.—From *Virginia Law Journal*.

August, 1884. The action was commenced on the 16th of March, 1885, or six months and twenty-six days thereafter. The policy of insurance, upon which the action was founded, amongst other things, contains the following condition: "No suit or action shall be maintained in any court upon this policy, unless the same be instituted within six months next succeeding the day upon which the loss or damage is alleged to have taken place."

The defendant pleaded this condition, to which the plaintiff replied, as follows: "And the plaintiff says that by reason of anything in the plea No. 2 alleged, he ought not to be barred from having and maintaining his aforesaid action against the said defendant, because he says, that after the said policy of insurance was issued, and before the period of six months from the date of loss and damage by fire had expired, viz., on the 11th day of February, 1885, the said defendant, by its own indorsement in writing upon said policy, waived the clause or provision of said policy in said plea referred to and set forth, and suspended the operation thereof, as follows, viz. :—

WINCHESTER, VA., Feb'y 11th, 1885.

The provision in this policy limiting the time within which suit may be brought against this company under it, is hereby waived for thirty days from this date.

VA. FIRE AND MARINE INS. CO.,

By W. L. Cowardin, Pres't.

"And this he is ready to verify. Wherefore he prays judgment," etc.

To this replication the defendant demurred. The circuit court overruled the demurrer, and, a jury being waived, gave judgment for the plaintiff for twenty-five hundred dollars, with interest and costs; whereupon the defendant obtained a writ of error from one of the judges of this court.

The question as to the validity of a condition in a policy of insurance, that suit upon the policy shall not be brought unless commenced within a stipulated time, less than the period prescribed by the statute of limitations, is well settled. Such a condition was sustained by the Supreme Court of the United States in *Riddlesbarger vs. Hartford Ins. Co.*, 7 Wall., 386; and to the same effect are numerous decisions of State courts of last resort. Wood on Fire Insurance, Sec. 434, and cases cited.

The real, and indeed the single, question in the case, is as to the effect of the written waiver of the 11th of February, 1885, set out in the replication to defendant's plea No. 2. On that day only seven

days remained of the six months' limitation contracted for in the body of the policy, and the defendant contends that the intention of the parties, and the effect of the language used in the written waiver, was merely to extend the time within which an action might be brought for thirty days from that date ; that is, to add to the stipulated limitation twenty-three days, and no more. But we cannot concur in this view. If such had been the intention of the parties, it is quite probable it would have been expressed in terms unambiguous and too plain to be misunderstood; like, for example, the following : "The time within which an action may be brought on the within policy is hereby extended for thirty days from this date," or words to that effect. But no such language was used, and the language employed cannot be reasonably construed to have that effect. It is—"The provision in this policy, etc., is hereby waived for thirty days from this date."

"The provision" is waived ; that is, the provision limiting the time for suit is suspended for thirty days, the effect of which was that the six months' limitation ceased to run for thirty days, and began to run again at the expiration of that time, when seven days remained of the time stipulated for in the policy.

It was the same in effect as if the insured and the defendant had been domiciled in different counties, between which war was declared on the 11th of February, 1885, and continued for exactly thirty days, during which time, upon principles of public law, the statute of limitations would have ceased to run, and in like manner the limitation contracted for by the parties.

According to Worcester, waive is to relinquish ; to put off ; to abandon. According to Webster, it is to relinquish ; not to insist on or claim. So that when, on the 11th of February, 1885, the parties agreed to waive the provision in the policy, they agreed to relinquish or to abandon it for thirty days from that date. In other words, they agreed to suspend its operation for thirty days, or to eliminate it, as it were, from the policy for that period.

Had the agreement, in the precise terms in which it is expressed, been entered into on the day of the alleged loss, when there were six months within which an action might have been brought, clearly it would either have had the effect already indicated, or it would have been meaningless and inoperative ; and it could not be construed to be the latter, consistently with the rule *ut res valeat*, etc. And if its effect on the 18th of August, 1884, would have been to suspend the operation of the provision in question, why should its

effect be different because it was entered into on the 11th of February, 1885.

We are not informed by the record what were the circumstances surrounding the parties at the time the agreement was entered into; but it is fairly inferable, from its language, that the intention was to give the plaintiff an additional period of thirty days within which to sue, if he should be so advised. But to the seven days next succeeding the date of the agreement the plaintiff was already entitled by virtue of his contract, and consequently they could not be conceded as a favor by the defendant. Hence, to give effect to the probable intention of the parties, we must hold that the limitation provision in the policy was suspended for thirty days from the 11th of February, 1885, with seven days to run from the expiration of that period—to wit, from the 13th of March, 1885.

The result is that the action was commenced in time, and the judgment of the circuit court must be affirmed.

Judgment Affirmed. Richardson, J., dissents.

SUPREME COURT OF MICHIGAN.

VAN POUCKE

vs.

NETHERLAND ST. VINCENT DE PAUL SOC.*)

By-law of a benevolent association authorized a committee to determine whether a member was entitled to sick benefits, and provided that "they were to be the only and final deciders thereof."

Held, That the by-law was reasonable, and a part of the contract of insurance in a mutual benevolent or co-operative order, and the members were bound by its terms when the committee act in good faith.

G. F. BEASLEY, *for Plaintiff*.

GEORGE GARTNER, *for Defendant*.

CHAMPLIN, J.

The defendant is a mutual benefit and co-operative insurance society, incorporated under the laws of this State, formed for the purpose of raising a fund, through monthly payments by its members to assist its sick and needy members, and, in case of death, to bear certain expenses of the funeral. It has a constitution and code of by-laws. The by-laws provide for the appointment of a committee of six members, called the "Sick Committee," whose duty it is to investigate and determine whether a member is entitled to benefit on account of sickness, and they are to be "the only and final deciders thereof." A member, being sick, and authorized as such by the committee to receive benefits, is entitled to receive, after the first week of his sickness, five dollars a week, so long as he is unable to work, such period not to extend beyond six months. The society is under no obligation to extend aid after the six months have elapsed, but the president may call a meeting to further resolve and consider the aid of such unfortunate member. The by-laws further provide that, in case an absent member gets sick, he should immediately notify the secretary, as the benefits accrue only from the time of such notification. He is also required to have the certificate of the doctor, who must investigate him at least once a week, and also he must have the

* Decision rendered; October 28, 1886.

certificate of the priest and a justice from the place where he resides. It is made the duty of the sick committee to visit the sick once a week. Neglecting this, they are liable to a fine of 50 cents. They shall also see if sick members have the right to benefits provided by the rules and by-laws of the society, and provide them with necessary aid. The by-laws also provide for an investigating committee, composed of 12 members, whose duty it is to judge of complaints which may arise against officers or members failing to perform their duty. The plaintiff became a member of this society in 1868, and agreed to fulfill all his duties, and to be obedient to all the laws and rules of the society which are not contrary to its constitution.

On January 15, 1883, while at work, he slipped, fell, and broke one of the bones of his wrist, which disabled him from work. He received benefits from the society to the amount of \$25. At the end of this time, complaint was made to the investigating committee that plaintiff had resumed work, and he was charged with receiving benefits when not entitled to them. The sick committee also investigated the matter, and requested plaintiff to appear before them, which he did, and, after investigation and deliberation, they decided that he was not entitled to receive any further benefits on account of his injury, and so notified plaintiff. Plaintiff claims, and so testified, that he was not able to work for six months with that arm, and that he carried it in a sling for ten or eleven weeks, and carried it bandaged for about four months.

The court instructed the jury "that, where a party makes a contract of this kind with himself and other persons, providing certain conditions on which he shall receive benefits from one of these organizations, he could only recover according to the terms which he has provided for in the by-laws; and if he has provided for a committee to determine the question for him, and he has referred it to a committee to determine the question as to whether he is sick, he made that a tribunal to determine; that he must be governed by it. He cannot recover outside of the condition which he has fixed for himself. It is as much a part of his contract as any other portion of it. He is to have his sick benefit when the committee says he is entitled to it, and he referred that matter to a committee to decide that question, and, of course, the decision of the committee, whatever that is, is final. If the committee decides he is entitled to it, and the corporation then refuses to pay, of course he has an immediate remedy against the society, and the committee stands between him and the society to determine those questions. Now, if you find that this com-

mittee have determined this question against him, then he is not entitled to recover. On the contrary, and that seems the only question, if you find the committee has not passed upon it—has not determined against him; it did not act—then you may render a verdict in his favor, for the amount claimed.”

This charge must be considered with reference to the facts of this particular case. If the by-law was reasonable and valid, not oppressive nor against public policy, it forms a part of the contract, and the plaintiff is bound by its terms. The court below evidently regarded it as a valid by-law, and his charge was based upon that view. This was a mutual benefit co-operative insurance society. The members stood upon an equal footing, and this by-law operates upon all alike. It is reasonable that the sick committee should be invested with authority to determine whether a member claiming to be sick is entitled to the benefit provided for in the by-law, and also when such benefit should cease. In a society comprising a numerous membership, deriving its revenues from small monthly contributions, it is of the utmost importance that its business should be carried on inexpensively, and with a proper regard to the object sought to be accomplished. It is necessary that there should be some mode of determining the question of when relief should be given and denied, and the method provided in the by-laws seems well adapted to the circumstances and needs of such a society. There is nothing oppressive in the terms of the by-law, and it contains nothing which the policy of the law forbids. If it is enforced in good faith, and with impartiality, which the members pledge themselves to do, it must result in benefit to sick members, and at the same time protect the funds of the society from depletion by the undeserving. No charge is made against the committee of having acted oppressively, fraudulently, or otherwise than from upright motives. The construction placed upon the contract entered into by plaintiff in becoming a member of this society was correct, and the question of fact bearing thereon was properly left to the jury. The remarks of the court preceding the language quoted from his charge, and to which exception was taken, were not prejudicial, in view of the remainder of the charge, which defined the issue, and directed the attention of the jury to questions of fact to be decided by them.

Exceptions were taken to the rulings of the court relative to the admission and exclusion of testimony. No error is discovered in such rulings, and the judgment must be affirmed.

The other justices concurred.

SUPREME COURT OF NEBRASKA.

Error from Lancaster County.

PHENIX INS. CO.)

vs.

LEMKE.*)

Where an action is brought on a promissory note before a justice of the peace, and the note is, copied by him into his docket and a summons issued thereon, it is a sufficient bill of particulars.

Where the justice has in his possession the instrument on which the action is brought, and there is no affidavit of the defendant made and filed with him denying its execution, nor any defense made to the action, the justice may render judgment on such instrument, although the plaintiff fail to appear.

*MARQUETTE, DEWESE & HALL, for Plaintiff.**JAMES E. PHILPOTT, for Defendant.**MAXWELL, J.*

This action was brought before a justice of the peace upon a promissory note, of which the following is a copy:—

\$20.

On the first day of April, 1884, for value received, I promise to pay to the Phenix Insurance Company of Brooklyn, N. Y. (at their office in Chicago, Ill.), or order, twenty dollars, in payment of premium on policy No. 695,866 of said company. If the note is not paid at maturity said policy shall then cease and determine, and be null and void, and so remain until the same shall be fully paid and received by said company. In case of loss under said policy this note shall immediately become due and payable, and shall be deducted from the amount of said loss. It is understood and agreed that this note is not negotiable.

Dated at my farm this day of April, 1883.

JOHN LEMKE.

Witness: J. A. CARPENTER.

* Opinion filed, October 6, 1885.
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The note was filed with the justice as a bill of particulars. A summons was issued, which was returnable on the sixth day of October, 1883. On the return day the defendant below appeared by attorney and obtained a continuance until the eleventh of October, 1883, at 2 o'clock P. M. At 2 o'clock P. M., October 11, 1883, the attorney for Lemke appeared, and moved to dismiss the action, for the following reasons: "(1) Because the plaintiffs had filed no bill of particulars of their demand; (2) because the said plaintiffs had not filed a bill of particulars against the defendant; (3) because the said plaintiffs did not appear at 2 o'clock P. M." The motion was overruled, and, the defendant refusing to appear further, judgment was rendered in favor of the plaintiff for the sum of \$20 and interest and costs. The defendant took the case on error to the district court, where the judgment of the justice was reversed, and the cause retained for trial.

The question here involved was before this court in *Wells vs. Turner* (14 Neb., 445), in which it was held that where a promissory note was left with a justice of the peace, who copied the same into his docket and issued summons thereon, it was a sufficient bill of particulars. It was also held that a justice, having in his possession the evidence of indebtedness upon which the action is brought, may render judgment on such evidence in the absence of any of the parties. This, we think, is a correct statement of the law. The statute requires a defendant, when sued on an instrument purporting to have been made by him, but who controverts the making of the same, to "make and file an affidavit with the justice of the peace, before whom the suit is pending, * * * that such instrument was not made, given, subscribed, accepted, or indorsed by him." Code, § 1,100 a. If no affidavit is filed in cases where there was personal service, the presumption is that the instrument is genuine, and proof of its execution is unnecessary. In this case no affidavit denying the execution of the note was filed, nor was any defense made to the same. Technical objections are not favored and will not be sustained, unless the matter complained of was prejudicial. But in this case there was no error in the judgment of the justice.

The judgment of the district court is reversed, and that of the justice re-instated and affirmed. Judgment accordingly.

SUPREME COURT OF IOWA.

Appeal from Pocahontas District Court.

PARKS

vs.

COUNCIL BLUFFS INS. CO.* }

The evidence of a witness of admissions by the plaintiff that the value of the property was much less than the amount of loss claimed is material, and when due diligence has been used, the absence of such a witness will justify a continuance.

Where evidence should be stricken from the abstract.

This is an action upon a policy of insurance against loss by fire. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

SAPP & PUSEY and L. W. MOODY, *for Appellant.*

McEWEN & GARLOCK, W. C. RALSTON, and ROBINSON & MILCHRIST,
for Appellee.

ROTHROCK, J.

1. The cause was tried in the court below at the January term, 1885. The answer and reply were filed on the twenty-first day of that month, and on the same day the defendant filed an application for continuance, upon the ground of the absence of a witness. Objections were filed by the plaintiff, and the continuance was denied. The defendant obtained leave to amend the motion for a continuance, and file additional affidavits. The amendment was made and additional affidavits filed on the next day. The plaintiff again

* Decision rendered, June 10, 1886.

objected to the motion, and the objections were sustained, and the motion overruled. The defendant excepted to the ruling, and assigns the same as error. We think the motion for continuance should have been sustained. The value of the property destroyed by fire, and for which plaintiff sought a recovery, was a material question in the case. The motion for continuance, and the affidavits in support thereof, show that the evidence of the absent witness was very material for the defendant. It was in the nature of direct admissions by the plaintiff that the property was of much less value than the damages claimed in the action. It is not claimed in the objections to the motion that the testimony of the witnesses was not material. The objections are grounded upon the want of diligence in the plaintiff in procuring the attendance of the absent witness. We think that due diligence was shown by the affidavits filed in support of the motion, and that the court, in the proper exercise of its discretion, should have sustained the motion. It is unnecessary to set out the facts in this opinion as they appear in the affidavits. To do so would serve no useful purpose, as the ruling we make thereon will not serve as a precedent. Each question of this nature must be determined upon its own facts, which are never alike in all respects.

2. This is the only question which we can determine upon this appeal. The appellee filed a motion in this court to strike the evidence from the abstract and from the transcript because it was not preserved by a proper bill of exceptions. The motion must be sustained. The bill of exceptions was what is denominated a skeleton bill, and contained no direction to the clerk of the court as to the source from which he was to obtain the evidence to insert in the bill. The only direction given to the clerk in regard to it is in these words: "Clerk, here insert the evidence." We have repeatedly held that such a reference is insufficient: *Hill vs. Holloway*, 52 Iowa, 678, s. c. 3 N. W. Rep., 722, and other cases.

For the error in overruling the motion for a continuance, the judgment will be reversed.

SUPREME COURT OF NEW JERSEY.

COX

vs.

FARMERS' MUT. FIRE INS. ASS'N.*

Where the by-law of a mutual company was pleaded to the effect that suit must be brought by the insured within six months if notified that the company declined to arbitrate or pay the loss.

Held, On demurrer that the plea was bad unless it alleged that the by-law antedated the making of the contract.

HARRIS & BRASLEY, for Demurrer.

J. G. SHIPMAN & SON, Contra.

PARKER, J.

This action is founded on a policy of insurance made by the defendant company on the 17th day of July, 1871, by which said company covenanted to insure certain buildings and other property of plaintiff against loss or damage by fire, for the term of ten years from the 9th day of June, 1871, in a sum not exceeding \$2,500.

The declaration is in legal form and makes averments which, if proved, will entitle the plaintiff to recover. Several pleas are filed. To the seventh plea the plaintiff has demurred. This plea sets forth and alleges that, by the fifth section of the act of incorporation of the defendant company, the board of directors has the power to make and prescribe such by-laws and regulations as to them shall appear needful and proper, and to alter and amend the same touching all such matters as appertain to the business ends, and purposes which said corporation, by such act, was entitled to; and also that, by the seventh section of said act of incorporation, it was provided that all

* Decision rendered, March 18, 1886.

policies of insurance which should be made by said corporation, in pursuance of said act, shall be made upon such terms and conditions as should be, from time to time, ordained and prescribed by the by-laws, rules, and regulations of said corporation. The plea then states that, in pursuance of the power and authority as aforesaid, the said board of directors did adopt and establish a by-law which, among other things, provided that, if the president of the company should cause notice to be given, in writing, to the insured that the company declined to have an arbitration or to pay the loss without suit against the company within six months thereafter, or be barred of his claim against the company, of which by-law the plaintiff had notice on the 17th of July, 1871, and that afterward the said company did cause notice to be given to the plaintiff that the company declined to have an arbitration or to pay the loss without suit, and that the plaintiff did not within six months after the receipt of such notice, bring suit against the company for the claim.

This plea is bad, because it does not allege that said by-law was adopted before the contract of insurance made with the plaintiff was entered into. It alleges that plaintiff had notice of the by-law on the 17th of July, 1871, but whether before or after the policy of insurance was entered into, it does not state. The plea should allege that the by-law was passed before the issuing of the policy: *Wood Fire Ins.*, 871; *Mutual Ins. Co. vs. Harvey*, 45 N. H., 292; demurrer sustained. As the plea thus overruled does not go to the merits of the case, the defendant cannot be permitted to plead *de novo*.

SUPREME COURT OF CALIFORNIA.

GARIDO*

vs.

AMERICAN CENTRAL INS. CO. OF ST. LOUIS.)

In an action on an insurance policy, which contains a clause that any suit or action thereon should be commenced within twelve months after the loss; *Held*, that the evidence did not sustain a finding that the delay in bringing the present action was caused by the conduct of the defendant; that, after the plaintiff had been informed of the position of the defendant, he had ample time, within the year, to commence his action.

SIDNEY V. SMITH & SON, *for the Appellant.*MILLS & JONES and WARMCASTLE & BOWIE, *for the Respondent.*

MYRICK J.

Action on an insurance policy. The property insured was destroyed February 15, 1880. The assured gave immediate notice of the loss, and as soon thereafter as practical made proofs as required by the policy. The complaint was filed November 1, 1881. The policy contained the clause that any suit or action thereon should be commenced within twelve months next after the loss. The action not having been commenced until nearly two years after the fire, the plaintiff endeavored to prove, and claims, and the court below found, that in and about negotiations for a compromise, the conduct of the defendant was such that it impliedly agreed to suspend the clause above referred to, and that the defendant held out hopes that an adjustment would be made, and induced the plaintiff and the assured to delay bringing the suit within one year after the loss.

* Opinion filed, November 20, 1885.—From *W. C. Reporter*.

Admitting that the agent Snow had full authority, we do not think there is evidence upon which to base the above findings. On the contrary, we think the plaintiff acted entirely upon his own judgment and that of his attorney.

Whatever may have been the effect of the negotiations prior to January 21, 1881, on that day plaintiff was distinctly informed of the position of the defendant. This was in ample time to commence the suit.

Judgment and order reversed, and cause remanded for a new trial. Thornton, J., and Morrison, C. J., concurred. 2

COURT OF APPEALS OF TEXAS.

ST. PAUL F. & M. INS. CO.)

vs.

ARCHIBOLD & KELL.*)

A provision in the policy that it shall be void if any change take place in possession, whether by voluntary act or otherwise, is violated if the sheriff has possession at the time of fire, whether legally or illegally, and whether the risk be increased or not.

HURT, J.

This was a suit upon a policy of insurance against fire. The house insured was used and occupied by appellees as their place of business as merchants at the time the contract was made, and the policy provided that * * * if any change takes place into the * * * possession, whether by * * voluntary act or otherwise * * * this policy shall be void. With or without the consent of appellees, legally or illegally, the sheriff of McLeman County had possession of the house at the date of the fire. The court instructed the jury in effect that the illegal possession by the sheriff did not vitiate the policy under the clause quoted unless the danger of fire was increased. This was not the contract of the parties. Whether the risk was increased or lessened or the possession of the sheriff was lawful or in violation of law, by the consent of appellees (unless as their agent) or against their wish, the parties have agreed that the contract is void if the possession is changed. The stipulation may be unreasonable and even outrageous, but it is the contract—it is not open to construction because it is unambiguous—it is not im-

* Decision rendered, Dec. 16, 1885.

possible, illegal, immoral, or against public policy, or for any reason void. That it is improvident or otherwise does not warrant the interference of the court: *Long vs. Ins. Co.*, 51 Tex.; *Ins. Co. vs. Camp*, Sup. Ct. Tyler, 1885.

The charge deprived appellant of the benefit of its contract, and the judgment against it for this error must be reversed and the cause remanded.

Other matters are complained of as errors, but we deem it unnecessary to consider them, as they may not arise on another trial.

Reversed and remanded.

LOWER COURT DECISION.

DUTY AND LIABILITY OF DIRECTORS.

Circuit Court of Cook Co., Illinois.

GEORGE M. BOGUE, RECEIVER,

vs.

WILLIAM F. TUCKER ET AL.

A director who ignores his duty, and by failure to attend meetings of the board, leaves the active management of the affairs of the corporation to other directors, is thereby guilty of such gross negligence as will make him responsible for many of the acts, if not all, that are not positively fraudulent of those to whom he left such management.

The receiver appointed in a proceeding by the State to wind up an insolvent insurance company, represents the corporation, the stockholders, and the creditors, and as such representative can bring a bill of this nature to enforce the liability of directors for gross neglect of duty, or for fraud, for the benefit of the parties that he represents, and to adjust in one proceeding all the liabilities and equities of the parties in interest.

J. L. HIGH, *for Complainant.*

C. C. & C. L. BONNEY, SMITH & CHILDS, CLARENCE A. BURLEY, ORVILLE PECKHAM, and E. A. OTIS, *for Defendants.*

TULEY, J.

The Chicago Life Insurance Company commenced business in 1867 with a subscribed capital of \$100,000, which was subsequently increased to \$125,000, and continued until the 7th of July, 1877, at which date, upon the petition of the State auditor, filed under the "Act in regard to the Dissolution of Insurance Companies," the complainant was appointed by this court receiver of the corporation, with the usual powers of a receiver. The receiver, with whom is joined a creditor of the company, now brings this bill against the defendants, who were members of one or more of the boards of directors from 1871 to 1877, seeking to make them liable for the deficiency of assets to pay the liabilities of the corporation, estimated by the receiver to be over \$374,000.

The bill charges, that the defendants occupied a trust position toward the company and its policy-holders, and that in the performance of their duties, as directors, they were guilty of such negligence and breaches of trust as to render them liable for the losses of such policy-holders, and the other creditors of the company. The allegations of the bill, which are admitted by the demurrers to be true, are in substance as follows :—

That the subscribers to the capital stock paid but ten per cent upon their subscriptions, giving for the remaining ninety per cent demand notes, some of which were secured by interest-bearing collaterals, which interest the owners of the collaterals were allowed to collect for their own use. That, although during the entire period from and inclusive of the year 1871 down to the appointment of the receiver at the suit of the auditor in 1877, the company was insolvent, and at no time had assets equal to the reserve required by law, the directors declared and paid dividends out of earnings in 1873, 1874, 1875, and 1876 at the rate of ten per cent per annum to the stockholders, none of whom, as stated, had paid more than ten per cent upon their stock.

The bill sets out various provisions of the by-laws intended as safeguards against frauds and checks upon officials, among others one requiring the treasurer to make a report as to the financial status of the company to the board of directors at their regular meetings, and one requiring the appointment by the board, annually, of an examining committee to examine and report upon the accounts of the secretary and treasurer; that during all of said period no such report was made or required, and no such examining committee was ever appointed.

The bill also alleges that during this time, annual statements were made to the State auditor, based on similar statements made at the stockholders' annual meetings and approved by the financial committee—which were fictitious and grossly false in many respects, to wit, as to the solvency of the corporation, as to the amount of its assets and liabilities, as to loans secured by stocks, bonds, and collaterals, which loans and securities were not the property of the company; false, as to the capital stock being fully paid, as to interest received on investments, and as to the amount of the company's expenditures; that these fictitious and false statements were extensively published by the auditor as required by law; that corresponding statements were sent out to all the agents of the company throughout the United States for the purpose, and were used for the purpose,

of inducing persons to take insurance in the company, and that a large proportion of the present policy-holders were thereby induced to become such.

While all these allegations are admitted by demurrer to be true, it is contended that they are insufficient in law for the reasons—

1st. As to the failure to call in the demand notes and put the proceeds at interest, that no such duty was imposed upon the directors, and that it is not alleged that any of the moneys called for by the demand notes were lost to the company by their failure to call in the same.

It may be that this averment, standing alone, might be insufficient to fix any liability upon the directors; but when it is taken in connection with allegations that only ten per cent was paid on the stock; that the company was insolvent as early as 1871, and never from that date on until it was seized at the suit of the auditor had assets equal to the reserve required by law, it shows a neglect of duty on the part of the directors certainly in not calling in the demand notes. An agent who, under like circumstances, would allow such demand notes to run for a period of five or six years, and until his principal was declared bankrupt, I apprehend would be deemed guilty of gross negligence. The directors of a corporation are agents of the corporation, and liable as such; and while it is true that they are vested with a large discretion in the management of the corporation affairs, and that good reasons may have existed for their failure to call in these demand notes, yet *prima facie* it was gross negligence, and puts upon them the burden of explaining or excusing their actions.

2d. As to the payment of dividends:—

The payment of dividends out of earnings from premiums upon unexpired risks, when the company had not assets equal to the required reserve, was clearly a breach of duty. It is, however, contended that the defendants are not liable as to the illegal dividends, because it is not alleged that the directors knew that the company was insolvent, or knew that it had not assets equal to the reserve required by law.

The objection is not tenable. It was the duty of the directors to inform themselves as to the financial condition of the company, and as to what funds had to be used in the payment of the dividends, whether it was net earnings or part of the capital. Their ignorance is no excuse. It may be that they were deceived by false information or doctored books, upon which they had a right to rely, but *prima facie* it was a misapplication of the corporate funds, either

intentional or arising from gross negligence, and must be satisfactorily explained to avoid liability.

It is objected that there is no allegation that the corporation can not recover the dividends from the stockholders who received them. The company may have a right of action against such stockholders, but *prima facie* it was a misapplication of corporate funds, for which the directors, being trustees, are primarily liable to the corporation and to its creditors.

As to the false annual statements sent to the auditor and to the agents of the corporation, it is objected that it is not alleged that the directors ordered them made, or sent out, or, if they did, that they knew the same to be false and fictitious. It was their business and duty to know, at least, the general management of the affairs of the company, and if these grossly false statements were, as alleged, made for a number of years in succession, printed at the expense of the company, sent to the company's agents and circulated by them—it was gross negligence if they, the directors, did not discover that they were being so sent and circulated, and that they were false and fictitious.

It is not necessary, in my opinion, to allege that the directors knew of the statements being sent out, and knew their false and fictitious character; if a state of facts be alleged which shows that they performed their duties in the management and control of the corporation as agents and trustees, they would, unless guilty of gross negligence, have known the same. The facts here alleged, considered with the by-laws, present such a state of facts.

It is also contended that these false annual statements were made by the president and secretary, one or both of them, and they being the officials who had such matters in special charge, the directors are not responsible for the acts of such officers. It is true, as a general principle, that directors are not liable for the wrongful acts of other officers or agents of the corporation, committed while not acting under their orders or direction. They are not guarantors of the integrity or good conduct of their officials, but they may become liable by reason of their own breach of duty. It is the duty of directors to supervise the actions of each other, and of the other officials of the corporation; and if, through gross neglect of their duties, the corporate funds are wasted or misapplied, or frauds are perpetrated upon other persons, which could not have happened had the directors performed their duties by giving that attention to the business affairs of the corporation required of them by law, to wit, such atten-

tion as an ordinarily prudent and cautious man would give to his own business affairs, then, in such case, the delinquent directors will be liable to the corporation, and to those who may be injured by reason thereof.

I do not wish to be understood as holding that, for a single false annual statement, signed by the president and secretary and sent to the auditor and agents without their knowledge, the directors would necessarily be liable (they might be, under some circumstances), but that as to those directors who continued in office for a number of successive years, during which such false statements were annually made, they would be guilty of such persistent, continuous negligence in the discharge of their duties as to make them liable for what is termed *crassa negligentia* or gross negligence, constituting a negative breach of duty, as agents and trustees of the corporation.

It may be that an action on the case, at law, will lie against each director by every policy-holder who may have been induced to take insurance by reason of such false annual statements, but I doubt if such action will lie because of the want of privity. But whether this be so or not, I am satisfied that the directors, if the facts alleged are true, are liable to the corporation by reason of their gross negligence in the execution of their duties, to the extent of the indebtedness or liabilities incurred by the corporation, growing out of such negligence.

The greatest difficulty I have found in this case is, that this bill is not as usual in bills of chancery, founded upon a transaction or a series of transactions in which the defendants all participated or were interested; but the recovery is sought against the members of several different boards of directors, some of whom participated in some of the acts charged, others in other and different acts, and therefore some of the defendants are not interested in the issues that must be joined as to others, and that the liability of the defendants is not a joint, but a several liability.

This objection, which is multifariousness, is one that does not always find favor with the court, as there is, says Story, in his work on Pleading, "Not any positive or inflexible rule as to what, in the sense of courts of equity, constitutes multifariousness which is fatal to a suit on demurrer." It appears to me that an objection of this nature depends, as to whether it will be sustained or not, largely upon the discretion of the court, guided by the particular circumstances of each case. It is said that the rule against multifariousness is to protect a defendant against unnecessary expense. In this case

the subject-matter of litigation is all connected with the affairs of the Chicago Life Insurance Company, and grows out of the relations of the defendants to that corporation, and to its shareholders and creditors. Such are the expansive powers of a court of equity, that it can adjust its decrees to all the complicated affairs and equities of any litigation, and however difficult it may be to determine the extent or quantum of liability of each of these defendants, I believe it can be done. As to the expense of them severally, the apportionment of the costs rests in the sound discretion of the court.

Several of these defendants, Tucker, Nickerson, Clapp, Currier, Frankenthal, Snyder, Florsheim, Friedman, and Isham, it is alleged, were members of the boards of directors continuously from 1871 to 1877; one defendant voted to declare all the dividends, and several others to declare six out of the seven; and others of them were members of the finance committee that approved the false annual statements. While it is true that one director is not liable for the wrongful act of another as a general rule, yet it is also true that each director is liable for his own gross or willful neglect of his duties, and gross neglect is really the gravamen of the bill in this case.

Because some of the directors did not vote for particular matters, or did not attend the meetings of the board, does not necessarily exonerate such directors from liability. A director who ignores his duty, and by failure to attend meetings of the board, leaves the active management of the affairs of the corporation to other directors, is thereby guilty of such gross negligence as will make him responsible for many of the acts, if not all, that are not positively fraudulent, of those to whom he left such management.

The objection is made that the receiver cannot bring this suit. In my opinion the receiver, appointed in a proceeding by the State to wind up an insolvent insurance company, represents the corporation, the stockholders and the creditors, and as such representative can bring a bill of this nature to enforce the liability of directors for gross neglect of duty or for fraud, for the benefit of the parties that he represents, and to adjust in one proceeding all the liabilities and equities of the parties in interest. This question of the power of the receiver to sue is before the supreme court, and has been over two years, on a writ of error from this court. I was in hopes that it would long ago have been decided, but I shall follow my former ruling until that court decides that I am wrong.

The demurrers will all be overruled.

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REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF APPEALS OF WEST VIRGINIA.

TRAVIS)

vs.

PEABODY INS. CO.*)

A declaration in assumpsit on a policy of insurance, not intended to be drawn after the form prescribed by ch. 66 of the acts of 1877, is nevertheless sufficient, if it in substance and effect sets forth the cause of action, by averments equivalent to those prescribed by that statute, although it may be insufficient as a common-law declaration.

The plaintiff during the trial of the cause, and before verdict found, may at the discretion of the court be permitted to amend his declaration in order that a material variance between its allegations and the proofs may be avoided, upon the terms, that if the defendant so request, the jury shall be discharged, the cause continued with leave to the defendant to amend his pleas, or plead anew to the declaration so amended.

* Decision rendered, October 23, 1896.
VOL. XVI.—11.

The circuit courts of this State, in the exercise of their general common-law jurisdiction, in the absence of any statute prohibiting them from doing so, and independently of any statute authorizing them to do so, may, in their discretion permit the pleadings to be amended, at any time before a verdict found, whenever justice will be promoted thereby and the same can be done without injury to the opposite party, but in every such case, if the opposite party requests it, the jury should be discharged, the cause continued with leave to the opposite party to amend his pleadings or to plead anew to the pleadings, so amended.

In an action upon a policy of insurance a plea that such policy was made and issued to a different person than the person named therein, although of the same name, is equivalent to the general issue, and if objected to, ought to be rejected, or if demurred to, the demurrer should be sustained.

Pleas which in effect deny that the plaintiff ever had any cause of action against the defendant, as in the declaration is alleged are equivalent to the general issue, and if objected to should be rejected.

In an action of assumpsit upon a policy of insurance of \$1,500.00 against loss by fire, of a certain stock of store goods, the defendant filed a plea alleging in substance that at and before the making of the policy, the insured falsely represented to the defendant's agent who issued the policy, that the stock of store goods about to be insured was worth \$2,000.00, which was false, and then by the insured known to be false and that the "goods" were not worth that sum; and that the insured then and there agreed, that during the continuance of the policy, he would keep in said store a stock of goods of the average value of \$2,000.00, and that he did not keep up his average stock to the value of \$2,000.00, but permitted the same to be run down until at the time they were destroyed, they did not exceed in value \$300.00. *Held*:

That such plea presents no good ground of defense, and having been objected to it ought to have been rejected, and having been demurred to the demurrer ought to have been sustained.

Where a defendant moves the court to set aside the verdict and grant him a new trial on the ground that the same is contrary to the evidence, the bill of exceptions certifies the evidence introduced on the trial and not the facts proved, the motion will be overruled, unless after rejecting all the parol evidence on the part of the defendant which is conflict with that of the plaintiff, the verdict is clearly wrong.

On the trial of an action upon a policy of a fire insurance company, an instruction which in effect tells the jury, that if the company's agent employed in issuing such policy, without any misrepresentation or suppression of the truth, by word or act on the part of the person desiring to be insured, or on the part of his agent employed in negotiating such insurance—fails or neglects to ascertain the identity of the person desiring such insurance, and believes that the name of the insured is in fact the name of his agent, and that the agent of the insured and the insured are one and the same person, such company is not bound to be insured by such policy—is erroneous, and was properly refused.

Where the declaration sufficiently sets forth a good cause of action, and there is no objection to the form or sufficiency of the verdict, a motion in arrest of judgment will be overruled.

JAMES MORROW, JR., for Plaintiff in Error.

U. N. ARNETT and J. A. HAGGERTY, for Defendants in Error.

WOODS, J.

Jonathan E. Travis, on the 13th day of May, 1882, instituted in the circuit court of Marion County his action of assumpsit against

the Peabody Insurance Company to recover the sum of \$1,500.00, for which he held a policy of insurance issued to him by said company, upon a stock of store goods owned by him, in a certain store-house, which during the continuance of the policy was destroyed by fire.

The declaration contained but a single count, which substantially averred, that the defendant on the 8th of November, 1881, by its instrument, in writing, called a policy of insurance, signed by Alonzo Loring, its president, attested by J. F. Paul, its secretary, and countersigned by J. E. Sands, its agent, in consideration of \$26.25, paid by the plaintiff, undertook to make good to him all loss or damage, not exceeding in amount the sum insured, being the sum of \$1,500.00, nor the interest of the plaintiff in the property thereby insured, and in said policy specified, the said plaintiff's stock of merchandise, consisting of dry goods (and other kinds of property particularly mentioned) all contained in a certain store-house (the description and location of which is particularly described in the policy and in the declaration) from the 8th day of November, 1881, at 12 o'clock (noon) to the 8th day of November, 1882, at 12 o'clock (noon), the amount of loss or damage to be estimated at the actual cash value of the property at the time of such loss, and to be paid at the office of the defendant in the city of Wheeling, W. Va., sixty days after due notice and proofs of the same shall have been made by the plaintiff and received at said office, in accordance with the terms and provisions of said policy, all of which, it was averred, would more fully appear by reference to said policy of insurance (which is herewith filed).

The declaration further averred that after the making of said policy, and while it was in full force, and before the 8th day of November, 1882, the said property so insured (particularly describing it), then being in said store-house (particularly describing it), was on the——day of December, 1881, totally consumed and destroyed by fire, and that afterwards the plaintiff made due notice and proof of said loss and damage of which the defendant had due notice, at his office in Wheeling, W. Va., more than sixty days before the commencement of the suit, the said loss and damage being estimated according to the terms and provisions of said policy, and that by notice thereof the defendant became liable to pay the plaintiff the said sum of \$1,500.00, being the amount of the damage sustained by the plaintiff by the reason of the loss and destruction of his said

property in manner aforesaid, so consumed or destroyed by fire as aforesaid.

The declaration further averred that he did not institute his said action until many days after the expiration of sixty days from the time the plaintiff gave to the defendant at his office in Wheeling, W. Va., due notice and proof of the destruction and loss of his said property by fire as aforesaid as required in said policy of insurance, and in conclusion averred that the defendant being so liable, afterwards, on the—day of—1882, undertook and promised to pay to the plaintiff the said sum of money mentioned in said policy whenever requested, etc., but although often requested has not paid, etc., to the damage of the plaintiff \$2,000.00.

To this declaration the defendant demurred, which demurrer was overruled. The defendant then pleaded the general issue, and tendered and offered to file special pleas Nos. 1, 2 and 3, to which plaintiff objected, and thereupon the court rejected plea No. 1, but allowed pleas Nos. 2 and 3 to be filed, to which the plaintiff then demurred, which demurrer was overruled, and the plaintiff replied generally thereto, and to the plea of non-assumpsit.

On the 17th July, 1883, the issues on these pleas were submitted to a jury, when the plaintiff offered to introduce in evidence said policy of insurance, to which the defendant objected, and the court sustained its objection and excluded the policy on account of an alleged variance between it and the one described in the declaration.

No other evidence was offered, and the plaintiff asked and obtained leave to amend and did amend his declaration by inserting therein the words, "which is herewith filed," and upon the motion of the defendant, and because of said amendment the jury was discharged and the case continued at the plaintiff's costs. To the ruling of the court allowing said amendment the defendant excepted.

Afterwards the defendant filed two other pleas, Nos. 5 and 6, to which the plaintiff demurred, but his demurrer was overruled. The defendant also filed another plea, No. 7, in the form prescribed by sec. 64 of ch. 125 of the Code of 1868, as amended by ch. 17 of the acts of 1882, accompanied by a statement in writing, giving notice of the grounds of defense why the action could not be maintained.

"1. Because the plaintiff did not make proof of his said loss, nor give the defendant notice thereof according to the requirements of said policy.

"2. The said policy of insurance was procured by the fraud and misrepresentation of the said plaintiff in this, to wit, the plaintiff

represented to defendant that the said goods, etc., insured were of the value of \$2,000.00 at the time said policy was made and issued, which plaintiff well knew to be false ; said goods were not at said time worth \$2,000.00 ; and in this said plaintiff procured one Joseph Travis, plaintiff's father, to personate him, the said plaintiff, and induce the defendant to believe, and defendant did believe at the time of entering into said contract and issuing said policy and thence until after the said loss occurred, that the said Joseph Travis was in fact J. E. Travis, and defendant in fact issued said policy to said Joseph Travis by the name of J. E. Travis and not to the plaintiff, as plaintiff well knew.

"3. The said policy was issued to Joseph Travis by the name and description of J. E. Travis, which defendant at the time of issuing said policy believed to be the true abbreviated name of said Joseph Travis, as the said plaintiff then and there well knew. Said Joseph Travis is another and different person from the plaintiff, and defendant never issued said policy of insurance to the plaintiff, and did not know that plaintiff was another and different person from the said Joseph Travis until after said loss had occurred.

"4. The said insured property was not, at the time said policy was issued nor at any time afterwards nor at the time of its destruction by fire, the property of said plaintiff, but the same belonged to him jointly with other persons.

"5. The said property destroyed by fire was owned, as to part of it, by the plaintiff jointly with other persons, and as to the other part thereof, the plaintiff had no interest therein, but the same was owned solely and exclusively by another person or by other persons.

"6. The said destruction by fire was the act of the plaintiff and his agent and servants and joint owners of said property."

The foregoing statement was verified by the affidavit of J. E. Sands, the defendant's agent.

To the plea the plaintiff filed a special replication, verified by the affidavit of his counsel as required by the statute, alleging matters in confession and avoidance of the first ground of defense set forth in the defendant's statement, accompanying his plea No. 7.

To this replication the defendant replied generally and issue was thereon joined.

At the December term, 1884, the cause was again submitted to a jury, who, after the evidence and argument of counsel had been heard on the 13th December, 1884, returned a verdict in favor of the plaintiff for nine hundred dollars damages.

Thereupon the defendant moved the court to arrest the judgment, and also to set aside the verdict and grant it a new trial on the ground that the same was contrary to the law and the evidence, and because of the matters set forth in the affidavit of Joseph E. Sands, of which motion the court took time to consider.

At a circuit court, held on the 2d of April, 1885, the defendant's motions in arrest of judgment and to set aside the verdict were overruled, and judgment was rendered in favor of the plaintiff for the sum of \$900.00, the damages assessed by the jury, with interest and costs.

To this ruling of the court the defendant excepted and filed its bill of exceptions, in which all the evidence introduced on the trial was certified. During the progress of the trial the defendant moved the court to give to the jury the following instructions:—

INSTRUCTION No. 1.

"If the jury believe from the evidence that the plaintiff is the son of Joseph Travis, otherwise called and known by the name of Doctor Travis, and that at the time of the making and issuing of said policy of insurance, the plaintiff was a young, unmarried man residing with his father and mother, and that the defendant had no other knowledge of either the plaintiff or the said Joseph Travis except what was possessed by Joseph E. Sands, defendant's agent at Fairmont, and if the jury further believe from the evidence that at the time of making said contract of insurance and issuing said policy, the said agent, Sands, knew said Joseph Travis as Doctor Travis, and had known him by that name and description for several years, but had never known J. E. Travis, the plaintiff, nor known that there were such a person, although said agent may have seen said J. E. Travis and known him to be a son of said Doctor Travis, and if the jury also believe from the evidence that said policy of insurance was applied for and obtained from said agent, Sands, by the said Joseph Travis, and that agent never had any conversation with said plaintiff in reference to said insurance or policy, and never saw said plaintiff nor heard of him at any time in relation to said insurance or policy until after the insured property had been destroyed by fire on the 9th day of December, 1881, and if the jury further believe from the evidence that at the time of making and issuing said policy of insurance, said agent inserted the name of J. E. Travis therein at the instance of the said Doctor Joseph Travis, the said agent believing that the said name J. E. Travis was the name of the said Doctor Joseph Travis, and that he, the said agent, was then and there making and

issuing said policy to the said Doctor Joseph Travis, then the court instructs the jury that the said policy is not a contract with the said plaintiff, and the verdict of the jury should be for the defendant."

INSTRUCTION No. 2.

"If the jury believe from the evidence that the property insured was owned by the plaintiff jointly with other persons and not by the plaintiff alone, they should find for the defendant."

INSTRUCTION No. 3.

"If the jury believe from the evidence that before and at the time of the making and issuing of the policy of insurance sued on, the plaintiff, or his agent acting for him in that behalf, represented and stated to defendant's agent who issued said policy and with whom said contract of insurance was wholly made, that the goods and property about to be insured were worth \$2,000.00, and if the jury further believe from the evidence that the said agent of the said defendant relied upon said statement and representations as to the value of said insured property and issued said policy of insurance relying upon and confiding in said representations and statements, and if the jury should further find from the evidence that said representations and statements were false and were known to said J. E. Travis to be false, and that said insured property was worth materially less than \$2,000.00, then the court instructs the jury that such false representations and statements avoid the policy, and the jury should find for the defendant."

INSTRUCTION No. 4.

"If the jury believe from the evidence that the defendant's agent made and issued the policy of insurance sued on to Joseph Travis, the father of the plaintiff, the said agent then and there believing the said Joseph Travis to be J. E. Travis, and that said agent did not know said J. E. Travis at the time of issuing said policy of insurance, then there was no contract with the plaintiff, and he can not recover in this action."

INSTRUCTION No. 5.

"If the jury believe from the evidence that the agent of the defendant made and issued the policy of insurance sued on to Joseph Travis believing him to be J. E. Travis, and that said Joseph Travis then and there knew said agent believed him to be J. E. Travis,

then there was no contract with J. E. Travis, and he cannot maintain this action."

The court gave to the jury the 2d and 5th, but refused to give the 4th instruction; it also refused to give the 1st in the form proposed, but modified the same by inserting after the words "Doctor Joseph Travis," where that name last occurs in said instruction these words, "and the said Doctor Joseph Travis then knew, or believed that the said agent supposed him to be J. E. Travis, and the owner of the store," and gave to the jury the instruction so modified.

The court also refused to give the 3d instruction in the form proposed, but modified the same, by inserting after the figures \$2,000.00 near the conclusion of the instruction these words, "and that this fact was known to the said J. E. Travis to be false," and gave to the jury the 3d instruction so modified.

To the ruling of the court in refusing to give said instructions to the jury as asked for, and modifying instructions one and three and giving the same as modified to the jury, the defendant excepted, and filed its bill of exceptions.

From this judgment the defendant has obtained a writ of error and supersedeas.

The plaintiff in error insists that the court erred—

1st. In overruling the demurrer to the declaration, because it contained no averment of property in the insured.

2d. In permitting the plaintiff to amend his declaration after the trial at December term, 1883, had been commenced.

3d. In refusing to give instruction No. 1 as moved by the defendant.

4th. In refusing to give its instruction No. 3 and No. 4.

5th. In overruling its motions in arrest of judgment and for a new trial.

The first question for consideration is the sufficiency of the declaration. It is evident that the pleader intended it to be a common-law declaration, and did not intend to adopt the form prescribed by chapter 66 of the acts of 1877, and the defendant in his demurrer so regarded it. A careful examination of the authorities on this subject leads us to the conclusion that in a policy of insurance against loss by fire the insured must possess an insurable interest in the subject-matter insured at the time the policy is executed, and at the time the loss occurred, and this insurable interest must be alleged in his declaration: *Quarrier vs. Peabody Insurance Co.*, 10 W. Va., 507; *Fowler vs. The New York Indemnity Insurance Co.*, 23

Bard., 143; 26 N. Y., 433; *Freeman vs. Fulton Fire Insurance Co.*, 38 Barb., 258; *Ruse vs. Mutual Benefit Life Insurance Co.*, 23 N. Y., 516; *Howard vs. The Abarry Insurance Co.*, 3 Denio, 301; *Granger vs. Howard Insurance Co.*, 5 Wend., 202; *Lane vs. Maine Mutual Fire Insurance Co.*, 12 Maine, 44; *Shepherd vs. Peabody Insurance Co.*, 21 W. Va., 368; *Lucas vs. Insurance Co.*, 23 W. Va., 258.

It is unnecessary to attempt to define the precise nature of such an insurable interest; it is sufficient in the present case to say it may be either the absolute ownership, or any less interest, or in some cases the simple possession of the subject-matter insured, as trustee or bailee or a right to apply the same to the satisfaction of some legal obligation resting upon such bailee or fiduciary, as in the *Lucas vs. Insurance Co.* and *Shepherd vs. Peabody Insurance Co.*, *supra*.

The precise manner in which, and the degree of particularity with which this insurable interest must be set forth in a common-law declaration does not very clearly appear, either in the adjudicated cases or in approved precedents.

In the declaration in this case before it was amended, the interest of the plaintiff, to say the least, was imperfectly set forth, and rather by way of recital than by direct averment. It recites that the defendant, by its policy, insured the "plaintiff's stock of merchandise," consisting of dry goods, etc., which is the only allegation setting forth the plaintiff's interest at the time the defendant assumed this risk. After averring the destruction of the insured property, the only allegation pretending to aver the ownership of this insurable interest, at the time the property was destroyed, is that the plaintiff had made due notice and proof of said loss and damage to the defendant more than sixty days before suit brought, and that "by virtue whereof the defendant became liable to pay the plaintiff the sum of \$1,500.00, being the amount of the damage sustained by him by reason of the loss and destruction of his said property in manner aforesaid."

Such an averment of an insurable interest was held to be insufficient by this court in the case of *Quarrier vs. Peabody Insurance Co.*, and *Fowler vs. N. Y. Indemnity Insurance Co.*, and *Laine vs. Maine Mutual Fire Insurance Co.*, *supra*.

But from the view we have taken of the question presented in this record, we deem it necessary to determine whether the declaration before its amendment was, or was not, sufficient as a common-law declaration.

When the declaration was amended by making the policy a part of it, it became in substance and effect a good declaration upon the policy, under provision of chapter 66 of the acts of 1877, which has since been introduced into ch. 125 of the Code of 1878 as amended by chapter 71 of the acts of 1882. By the introduction of the policy into the declaration by said amendment, it clearly appeared that the plaintiff had an insurable interest in said property, and the policy on its face was sufficient *prima facie* evidence of the fact that the insured had an insurable interest in the property and the burden of overcoming this *prima facie* evidence rests upon the defendant: *Shepherd vs. Insurance Co., supra.*

By section 61 of ch. 125 of the code as amended, the declaration upon this policy of insurance would have been sufficient if it had in effect averred, "that the defendant, by virtue of the policy of insurance herewith filed, owed \$1,500.00 to the plaintiff for loss in respect to the "plaintiff's stock of store-goods," insured by said policy—caused by fire on or about the—day of December, 1881, in his store-house situated on White Day Creek, about five miles from Smithtown and Grafton road in Marion County, W. Va.

All other allegations ordinarily used in common-law declarations on policies of insurance other than life policies are no longer necessary, and if the declaration under consideration, whether intended to be in the common-law form or in the form prescribed by the statute,—in effect contains the allegations prescribed by the statute, it will be sufficient.

Comparing the declaration in this case, as amended, with the form prescribed by the statute, it will be found to contain in effect every allegation required.

The declaration as amended not having been demurred to, it would have been unnecessary to consider it but for the plaintiff's demurrers to the defendant's pleas which required us to examine the declaration also, as such demurrer goes back to the first pleading of the demurrant. As amended the declaration was sufficient for the plaintiff to maintain his action.

It is earnestly insisted by the counsel for the plaintiff in error that the court erred in permitting the declaration to be amended after a jury was sworn to try the case, because the amendment was in regard to a matter of substance material to the cause.

By sec. 8 of ch. 131 of the code, such an amendment was expressly authorized. It provides, "if at the trial of any action there appear to be a variance between the evidence and allegations or recitals,

the court may, if in its opinion substantial justice will be promoted thereby, allow the pleadings to be amended, and if it be made to appear that a continuance of the cause is thereby rendered necessary, such continuance shall be granted at the costs of the party making the amendment."

While this statute authorized this amendment, the courts of this State had frequently exercised this authority in similar cases, as incident to courts of common law wherever the justice of the cause required it, and the amendment could be made without injury to the opposite party.

In *Tabb vs. Gregory* (4 Call, 225), the court of appeals held that an amendment to the declaration may be allowed during the trial of the issue; but if the defendant requests it, the jury should be discharged, the defendant permitted to amend his plea or plead anew and the cause continued. In that case, the amendment allowed was held by the court of appeals to be unnecessary and therefore immaterial, but deeming it important that the practice in such cases should be settled, it took time to consider, and afterwards announced its opinion that the amendment was allowable on principle.

Lyons, Judge, delivering the opinion of the court, said "that the rigor of the common law has been gradually departed from until it has become the settled doctrine, that amendments, at the discretion of the court, may be allowed at any time before final judgment, provided they produce no injury to the opposite party. Even after the verdict is returned, if there be anything by which it can be done, or the justice of the case requires it, amendments will be allowed."

"So that to promote justice on one hand and prevent injury on the other seems to be all that is requisite; for if these can be effected the amendment will be allowed at any time before final judgment."

The case of *Anderson vs. Dudley* 5 (Call, 529), was on action of debt, brought upon a judgment recorded in that court of £144,17.2½ and costs, but declared for £144,7.2½ and costs. The defendant pleaded "No such record." Upon the trial of the issues on this plea, the plaintiff was allowed to amend his declaration, by inserting the correct sum, to which the defendant excepted. The question was carried to the court of appeals, which held that there was no error in permitting the amendment to be made.

In the court of the King's Bench, in *Doubleday vs.*—(2 Chitty L., 27), it was held that if on issue on nul tiel record, there is a variance the

court will permit an amendment on payment of costs ; and in *Storer vs. Gordon* (2 Chitty R., 27), it was held that after a trial and verdict for the plaintiff, the defendant was allowed to amend his plea, and have a new trial on payment of costs.

These authorities sufficiently show that the circuit courts of this State in the exercise of their general common-law jurisdiction, in the absence of any statute prohibiting them from doing so, and independently of any statute authorizing them to do so, may in their discretion permit the pleadings to be amended at any time before verdict found, wherever justice will be promoted thereby without injury to the opposite party ; but in every such case if the opposite party requests it, the jury should be discharged, the opposite party allowed to amend his pleadings or to plead anew to the pleadings so amended, and the cause continued.

The amendment complained of in the case under consideration was made upon the trial, before verdict found, and the cause on motion of the defendant because of the amendment, was continued at the plaintiff's costs.

There was therefore no error in the ruling of the court in allowing the defendant to amend his declaration, although it was in regard to a matter material to the success of his cause. The defendant's plea of non-assumpsit put in issue every material allegation of the declaration, and the burden of proving that the contract in the policy mentioned in the declaration, was made by the defendant with the plaintiff, that the property insured was the property of the plaintiff at the time the same was insured, and at the time the same was destroyed, and also the amount and value of the same at that time, rested upon the plaintiff, and without this proof he could not recover.

The defendant's first special plea was properly rejected, as it was equivalent to the general issue, and as the defendant's special pleas No. 2, No. 5, and No. 6 were, in effect, the same as the general issue, with the facts necessary to support the same superadded, the plaintiff's demurrer thereto ought to have been sustained.

The defendant's third special plea attempts to avoid the contract in the policy, on the ground that the plaintiff procured the same to be made by fraud. The grounds of this fraud are alleged to be, that before and at the time of making said contract and issuing said policy, the plaintiff falsely and fraudulently represented to the defendant that his stock of goods, etc., mentioned in the policy were of the value of \$2,000.00, and that he would keep in said store a stock

of such merchandise of the average value of \$2,000.00 during the continuance of the insurance ; and the defendant relying solely upon said representations of the plaintiff, and believing the same to be true, entered into the contract and delivered the policy, and then averred that these representations were false and fraudulent, and known by the plaintiff to be false, and were made to deceive and defraud the defendant.

This plea further averred that the said "stock of goods" was not at any time worth \$2,000.00 ; and that the plaintiff did not keep in said store a stock of merchandise of the average value of \$2,000.00. On the contrary, the value of the entire stock in said store or kept by the plaintiff was not of greater value than \$1,000.00, and that the average value of the stock kept in the store after making the policy did not reach \$1,000.00—and at the time of the loss did not exceed \$300.00.

This plea does not allege that the plaintiff, either in said policy or in any writing therein referred to or made part thereof, made any such representations or promises as are set forth in said plea. And if any such were made as to the value of said goods during the negotiations resulting in said policy of insurance, and they were not mentioned therein, or in some writing therein referred to or made part thereof, no evidence in regard thereto tending to contradict, alter, or modify the contract in said policy would be admissible, on the well-established and familiar principle of evidence that the contract having been reduced to writing and free from all ambiguity, it could not be contradicted, modified, or altered by parol evidence; and therefore the fact alleged that during such negotiations, such representations as to the value of "stock of goods" were made, could not be said to be such a fraud as to render the policy void.

The second allegation of the plea is, that the plaintiff promised to keep up his average stock of goods to the amount of \$2,000.00 during the continuance of the risk.

Admitting this allegation of the plea to be true, as stated, we are unable to perceive how the failure to perform a stipulation in a contract can be transformed into a fraud in procuring the contract to be made; nor are we able to comprehend how the defendant could be injured by the plaintiff failing to keep on hand in his said storehouse during the continuance of the policy, a stock of goods less than the sum of \$1,500.00, the amount for which the goods were insured, even though at the time of the loss they did not exceed the sum of \$300.00.

It would rather seem to us that whenever and as often as the stock of goods mentioned in the policy were reduced in value below the amount of the insurance thereon, the defendant's risk would be proportionably diminished, and if at any time during the continuance of the policy, the whole stock has been sold, the defendant's risk would have been totally suspended until the stock was replaced by additional purchases.

So far from the defendant being injured by the failure of the plaintiff to keep up his stock of goods to the average value of \$2,000.00 during the continuance of the policy, and by permitting it to run down to less than \$300.00 at the time of the loss, the plaintiff was benefited by reducing the defendant's risk from \$1,500.00 to \$300.00. This plea presented no defense to the plaintiff's action, and his demurrer thereto should have been sustained.

From the view we have taken of this case, the errors committed by the circuit court in overruling the plaintiff's demurrer to the defendant's pleas Nos. 2, 3, 5, and 6 become immaterial, as the verdict, notwithstanding the presence of the pleas, was in favor of the plaintiff.

The defendant's plea No. 7 is in the form prescribed by sec. 54 of ch. 125 of the code as amended by the acts of 1882, and consists of the simple denial of its "liability to the plaintiff as in the declaration is alleged."

The second specification of the grounds of defense accompanying this plea, is in substance and effect the same as plea No. 3, which, as we have already seen, presents no grounds of defense to the action.

The third, fourth, fifth, and sixth specifications, accompanying plea No. 7, are unwarranted by the statute, and present no grounds of defense, but what are admissible upon the trial of the issues upon the last named-plea, and the plea of non-assumpsit. Did the court err in refusing to give to the jury the instructions asked for by the defendant, in the form in which they were proposed, or in modifying the first and third instructions, and giving the same, as modified, to the jury?

The substance of this instruction, divested of unnecessary verbiage, is, that "if Dr. Joseph Travis, then well known to the defendant's agent, Sands, procured him to execute said policy to the plaintiff, with whom said agent never had any acquaintance, nor conversation in reference to the policy, until after the insured property had been destroyed by fire; and if the agent, Sands, at the instance of Dr. Joseph Travis inserted in the policy the name of J. E. Travis, then believing that this was the name of Dr. Joseph Travis, and that he

was then and there making and issuing said policy to Dr. Joseph Travis, then in that case the policy is not a contract with the plaintiff."

It in effect declares that if the defendant's agent, without any misrepresentation or suppression of the truth by word or act on the part of the person desiring to be insured, or of his agent employed in negotiating such insurance, fails or neglects to ascertain the identity of such person, and believes that the name of the insured is in fact the name of his agent, and that the person insured and his agent are one and the same person, the defendant may, because of such neglect or mistake of its own agent, absolve itself from the obligation of its contract.

This position is untenable because in such case the obligation of the contract would cease to be mutual, and would become entirely dependent upon the pleasure of one of the contracting parties. Such a doctrine would destroy all confidence in the obligation of any contract.

But if the insured or his agent at the time of the making of said policy knew or believed that the agent of defendant supposed that Dr. Joseph Travis was in fact the person whose goods were being insured, and neglected and failed to correct his mistake, and thus misled him, as to the person whose goods were actually insured, then such policy would not be a contract with the plaintiff.

The defendant's first instruction, as proposed by him, did not, and the same, as modified by the court and given to the jury, did correctly propound the law, and therefore the circuit court did not err in refusing to give the same to the jury as propounded, nor in giving the same to the jury as modified.

We are further of opinion, that the defendant's third instruction, as modified and given to the jury, was substantially the same before as well as after its modification, and the same was properly given to the jury, and that the defendant was not in any manner injured by giving the same to the jury as modified by the court.

The defendant's fourth instruction was in substance the same as the first, before the same was modified, and was therefore properly rejected.

As we have already shown that the declaration, as amended, sufficiently set forth a good cause of action, and there being no objection to the form or substance of the verdict, the defendant's motion in arrest of judgment was properly overruled.

It only remains for us to consider whether the circuit court erred

in overruling the defendant's motion to set aside the verdict and award it a new trial.

Two grounds are alleged on which this motion rests; first, that the verdict is contrary to the law and the evidence. From what has already been said, we are of opinion that the verdict is not contrary to the law.

The bill of exceptions certifies all the evidence which was introduced before the jury on the trial, and does not attempt to certify the facts proved.

In such case the rule is well settled, that where the evidence, and not the facts, is certified in the bill of exceptions the appellate court will not reverse the judgment, unless after rejecting all the conflicting parol evidence of the exceptor and giving full faith and credit to that of the adverse party the decision of the trial court still appears to be wrong. To justify the court in granting a new trial the evidence should be plainly insufficient to support the verdict: *Grayson's Case*, 6 Gratt., 712; *State vs. Flannagan*, 26 W. Va., 116; *Smith vs. Townsend*, 21 W. Va., 486; *Black vs. Thomas*, W. Va., 709; *State vs. Thompson*, W. Va., 741; *Carrington vs. Bennett*, 1 Leigh, 310; *Ewing vs. Ewing*, 2 Leigh 337.

The only documentary evidence which was before the jury was the policy of insurance, and a letter written by the defendant's secretary, dated January 11, 1882, informing the plaintiff that the defendant declined to acknowledge any liability upon the policy for destruction of the goods thereby insured.

About this written evidence there was no dispute, nor was there any conflict between the policy and the said letter.

Applying to the evidence certified in this case the rule already announced, there remains abundant evidence tending to support the verdict of the jury. Many witnesses were examined as to the fact that the property insured was destroyed by fire as alleged in the declaration, the time when and the circumstances attending and surrounding its destruction, and of the amount and value of the goods in the plaintiff's storehouse at the time it was destroyed and that the plaintiff at the time the policy issued and at the time the loss took place was the owner of the goods insured, and that when destroyed these goods were worth as much as found by the jury.

Upon an examination of all the evidence, we are of opinion that it fully warranted the verdict of the jury.

But we are asked to set this verdict aside on the grounds of newly discovered evidence as set forth in the affidavit of said Joseph E.

Sands, who therein deposed that since the rendition of that verdict he has discovered new and additional evidence of great importance to the defendant, which was not known by it nor had ever come to the knowledge of affiant, its agent as aforesaid, until after the trial; that if it had been known that it could be had a different result would have been reached on the trial.

The affidavit then sets out this newly discovered evidence, and it is precisely of the same character as was the testimony of at least a dozen witnesses, who were examined on the trial, merely tending to show the value of the goods in the plaintiff's store shortly before the loss occurred, the whole being merely cumulative, and no sufficient reason is given why this evidence was not produced at the trial, nor is it stated that their supposed materiality was unknown to the defendant nor its counsel, who so ably conducted its defense in the circuit court.

The facts stated in the affidavit are clearly insufficient to warrant the court in disturbing the verdict.

We are of opinion that the defendant's motion to set aside the verdict and award it a new trial was properly overruled.

The judgment of the circuit court of Marion County is affirmed with costs and damages according to law. Affirmed.

SUPREME COURT OF INDIANA.

Appeal from the Posey Circuit Court.

NORTH BRITISH & MERCANTILE INS. CO. }

vs. }

CRUTCHFIELD ET AL.*

A demurrer to evidence admits all facts and reasonable inferences which such evidence may tend to establish.

The adjuster informed insured that proofs of loss must be forwarded to the company's office, that the authorized local agent who countersigned the policy would not receive them.

Held, That in the absence of any policy required to that effect, a tender of the proofs to the local agent of a company of another State was sufficient.

Held, That where on the trial no questions regarding the character of the proofs were put to the assured by the company, and it did not appear that the local agent objected to their sufficiency, they will be held sufficient on demurrer.

A policy provision that any other person than the assured procuring the insurance shall be deemed the agent of the insured, will not make such local agent the agent of the insured.

Where there is a demurrer to evidence and a joinder, the court may have damages assessed by the jury conditionally, or the jury may be discharged and the assessment made by another jury if the demurrer be overruled.

Howe, J.

In this case the only error relied upon here by appellant, the defendant below, for the reversal of the judgment of the trial court, is the overruling of its demurrer to appellee's evidence. The action was upon a policy of insurance executed by appellant and countersigned and issued by its duly authorized agent at Mount Vernon, Indiana, on the 9th day of February, 1882, to one Thos. J. Gordon,

* Decision rendered, December 17, 1886.

whereby appellant, in consideration of a certain premium, did insure the said Gordon against loss or damage by fire to his property therein described, in the sum of \$1,600, for the term of three years from and after the date of the policy, as follows: \$1,000 on his one-story, frame dwelling-house, \$200 on his household and kitchen furniture and \$400 on his one-story, frame store-room—all occupied by him, and situated on his farm, on the Mount Vernon and Union-town road in Henderson County, Kentucky. It was alleged by appellees in their complaint, that on the 20th day of August, 1884, said dwelling-house was wholly consumed by fire, and the furniture damaged by such fire in the sum of \$100; that at the time of such loss Thos. J. Gordon was the owner of the property so destroyed and damaged, and fully performed all the conditions of the policy on his part; and that on September 1, 1884, Gordon assigned in writing the aforesaid policy to appellees. Wherefore, etc., issue was joined by appellant's answer in general denial. Counsel on both sides concur in stating that the only evidence introduced by appellees in support of their cause of action, was the policy of insurance and its assignment and the oral testimony of Thomas J. Gordon.

On behalf of the appellant, its counsel insist that the evidence wholly fails to show that the assured had complied with the conditions of his policy, which required him to render a particular account of his loss, signed and sworn to by him, stating whether any and what other insurance had been made on the same property, etc. On the other hand appellee's counsel contends that the conduct of the adjuster and general agent of the appellant towards the assured, as shown by his testimony on the trial, was such as to dispense with or constitute a waiver of any compliance by the assured with the conditions of his policy requiring him to render a particular account of his loss.

We give, in this connection, from the brief of appellant's counsel the entire testimony of the assured, Thomas J. Gordon, on the trial of this cause as follows: "The house mentioned in the policy belonging to me burned on the 20th day of August, 1884, at ten o'clock in the morning, after breakfast. It was a total loss, and part of the furniture in the house also burned. We saved some of it. It left us out-doors, and we batched in a tent. I came to John L. Rosenkrans, the local agent of the company at Mount Vernon, Indiana, and told him of the loss. I sent word to him before that by David Barker. When I told Rosenkrans of the loss, he said it was best to wait until Mr. T. H. Smith, the adjuster of the company

came; that he (Rosenkrans) had nothing to do of that kind, and that the adjuster would be here shortly. I waited eight or ten days and came down again to see Rosenkrans, when I asked him if the North British and Mercantile Insurance Company had gone into bankruptcy, Rosenkrans replied that he had just received a telegram from Mr. Smith that he would be at Mount Vernon that night, and for him (Rosenkrans) to prepare for a ride to-morrow. He came, and they went over the river from Mount Vernon to the premises where the house burned. The next day or two after that, on Monday, I saw Mr. Smith, the adjuster and general agent, in Mr. Rosenkrans' office in Mount Vernon. He (Smith) asked me if I had made out plans and specifications and proofs of loss; that the company required them to be made. I said 'I am ready to make proof of loss or any other papers he wanted.' He would not furnish me any papers for that purpose, and he refused to give me any instructions or satisfaction. I told him I would make them out in ten days. He said it would take thirty days. After that I tendered my account of losses to Rosenkrans. He refused to take them. Rosenkrans told me I must send them to the company at Chicago, and offered to furnish me an envelope with the address to send it in. Mr. Smith asked me if I had filed plans and specifications of the building burned and proof of loss. I filed my account of loss with Rosenkrans, or offered to do so, the second day after Mr. Smith was in Mount Vernon, and Rosenkrans refused to take them. Mr. Smith told me there were a couple of stoves saved from the building, and asked me to take care of the stoves and a piece of the sills of the house until the suit, so they could be produced at the trial if we had a suit. I saved a piece of the sill, and intended to have it here to-day. I sent for it, but it is not here. I was owner of the house and furniture at the time of the loss."

And said witness, being cross-examined by the defendant, testified as follows: "Mr. Smith, the adjuster, was here about three weeks after the 20th day of August, 1884, the day the house burned. It was four or five days after the fire that I saw John L. Rosenkrans, and told him of the loss. I only saw Mr. Smith twice. I talked with him twice only—both times at Mr. Rosenkrans' office in the Posey County Bank. John L. Rosenkrans, Luke Rosenkrans, and William D. Crunk, were the only persons present at those two conversations. They were there when the conversations took place, except that W. D. Crunk was not present all the time, and John and Luke Rosenkrans were. The policy of insurance was then in the

Possey County Bank. At that time Mr. Smith told me to send the plans and specifications of the house and the proofs of loss to Chicago, that Mr. Rosenkrans would furnish me a printed envelope to send them in; that Mr. Rosenkrans had no right to receive them, and that they must be sent by me to the company at Chicago, and I must put it into the post-office myself. Mr. Smith said to me that he required plans and specifications of the house burned. I told him I was ready to furnish them. I never made or furnished any plans or specifications. I tendered plans and specifications and proof of loss to Rosenkrans two days after Smith was here, and he refused to take them."

Redirect examination: "Mr. Smith asked me if I had filed plans and specifications and proof of loss. I said I would file them in two days. He replied, 'you can't file them that soon, it will take you thirty days.' He told me I must send them to Chicago. I said I would file them day after to-morrow. He said, if you do make them out they will not be right, and said he would send them back and keep sending them back until they were right. He said, 'I am ready to file papers to Rosenkrans,' and Rosenkrans said he would not take them, that he had nothing of that kind to do, that he would furnish me a printed envelope for me to send them to Chicago, and I must mail it myself at the post-office. Mr. Smith said he would return them as long as I sent them if they were not right."

In considering the sufficiency of the evidence to sustain the decision of the circuit court in overruling appellant's demurrer to appellee's evidence, it must be borne in mind that, by its demurrer, appellant admitted all facts of which there was any evidence, and all conclusions which can fairly and logically be drawn from such facts.

In passing upon and deciding the questions presented by a demurrer to the evidence, the court must consider, not only all of the facts which the evidence tends to establish, but also all such fair and reasonable inferences as of facts as the jury, if trying the cause, might have lawfully drawn from such evidence. The rule, as we have stated it, which controls in the consideration and decision of a demurrer to evidence, is declared in and sustained by many of our reported cases: *Trimble vs. Pollock*, 77 Ind., 576, and cases cited; *Wilcutts vs. Northwestern Mut. Life Ins. Co.*, 81 Ind., 300, and cases cited; *McLean vs. Equitable Life Assur. Soc.*, 100 Ind., 127, and cases cited; *Lake Shore etc. Ry. Co. vs. Foster*, 104 Ind., 293.

In the case last cited, in laying down the rules to be applied by the courts in passing upon a demurrer to the evidence admits all facts which the evidence tends to prove, or of which there is any evidence, however slight, and all inferences which can be logically and reasonably drawn from the evidence. See also the numerous authorities there cited in support of this first rule.

Having thus stated the rules which must govern us in passing upon appellant's demurrer to appellee's evidence, we pass now to the consideration and decision of the particular points or questions upon which appellant's counsel rely, with much apparent confidence, for the reversal of the judgment. We have already stated, but will here repeat, what we regard as the principal point urged by appellant's counsel for the reversal of the judgment herein in their own language as follows: "It was necessary before plaintiffs could recover for them to show that the assured had complied with the conditions of his policy, which required him to render a particular account of his loss, signed and sworn to by him, stating whether any and what other insurance had been made on the same property," etc. Appellees alleged in their complaint, as we have seen, that the assured fully performed all the conditions of the policy on his part. The conditions of the policy to which appellant's counsel refer in the above quotation from their brief of this cause, reads as follows: "Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company, and as soon thereafter as possible, render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property," etc. The "particular account of such loss," mentioned in the foregoing condition is what is known in common parlance as the "proofs of loss." Appellant's counsel claim that the evidence wholly fails to show any compliance by the assured with the foregoing condition of his policy. If this claim of counsel is sustained by the record, then the trial court erred in overruling appellant's demurrer to the evidence, and the judgment below must be reversed.

The first question for our decision, under the law, therefore, may be thus stated: Is there any evidence, however slight, in the record of this cause, which tends to prove, or from which the triers of the facts might logically and reasonably infer, that, at the proper time, the assured has substantially complied with the foregoing condition of his policy by rendering to the appellant the particular account or proper proof of his loss? We are of opinion that this question ought to be, and must be answered in the affirmative.

The policy of insurance was in evidence, and it showed upon its face that J. L. Rosenkrans was the "duly authorized agent of the company at Mount Vernon, Indiana," and that he there counter-signed and issued the policy to the assured on the 9th day of February, 1882. From this evidence the trier of the facts might reasonably infer that appellant's agent had, by complying with the provisions of section 3,765, Rev. St., 1881, in force since March 3, 1877, obtained from the auditor of State the proper certificate of authority "to take risks or transact any business of insurance in this State," in the name of appellant, and as its agent. Other evidence in the record tended to prove that Rosenkrans continued to act as the duly authorized agent of appellant until some time after the loss by fire of the property insured by the policy sued on herein. There is evidence, also, tending to prove that the assured promptly notified appellant's agent Rosenkrans of the loss of his dwelling-house by fire.

No objection is made by appellant's counsel to this notice, and it may be assumed therefore, that, in so far as notice of the loss to the company was concerned, the giving of such notice to its agent, Rosenkrans, was a sufficient compliance by the assured with the aforesaid condition of the policy. By the terms of the same condition the particular account of his loss was also to be rendered to the company. Upon this subject the assured testified: "I tendered plans and specifications and proof of loss to Rosenkrans, two days after Smith was here, and he refused to take them." Elsewhere it appeared that Rosenkrans was probably acting under the instructions of Smith, the adjuster, in refusing to receive the proof of loss when tendered by the assured.

According to the evidence, Smith was apparently determined to baffle the assured, and keep him out of the money due on his policy. It was insisted by Smith that the assured must send the proof of loss to him at Chicago, Illinois; but this was not required by the terms of the policy, and certainly in the absence of contract, it was never contemplated by our statute, which Rosenkrans was authorized, as appellant's agent, to transact its business of insurance in this State. Under our statute, there can be no doubt, we think, that, where a condition of the policy requires that notice of the loss shall be given to the company, the giving of such notice to the duly authorized agent of a foreign insurance company, doing business in this State, will be a sufficient compliance with the terms of such condition. In *Pittsburgh etc. Ry. Co. vs. Ruby* (38 Ind.,

294) it was held "that notice to an agent of a corporation, relating to any matter of which he has the management and control, is notice to the corporation." In *Phoenix Mut. Life Ins. Co. vs. Hinsley* (75 Ind., 1), after quoting the rule on the subject of notice to an agent of a corporation, as stated the case last cited, the court said: "It seems to us that this rule of law is especially applicable to the agents of foreign insurance companies, transacting the business of insurance for their companies in this State, and that it must be held that notice to such agents in relation to any business of insurance transacted by them for their companies is notice to such companies." Upon the points stated in this quotation the case last cited has been approved and followed in *Willcutts vs. Northwestern Mut. Life Ins. Co.*, supra, and in *Ætna Ins. Co., vs. Shryer*, 85 Ind., 362.

We know of no good reason why it should not be held, also, where the condition of the policy, as in the one under consideration, requires that the assured shall render the particular account of his loss to the company, and not to any specified officer or person, or at any specified office or place, that the rendering of such particular account of his loss by the assured to the duly authorized agent of a foreign insurance company will constitute a sufficient compliance by the assured with the terms of such condition. Text writers and courts agree in saying that the agent of an insurance company may waive the rendering, by the assured, of the particular account or proofs of his loss, and that such waiver may be implied by or inferred from the facts and circumstances of the case: *Ætna Ins. Co. vs. Shryer*, supra, and authorities cited. A fortiori, should it be said, we think, that the tender, by the assured, of his proofs of loss to the agent of a foreign insurance company who counter-signed and issued to the assured his policy, and who, so far as appears, was the only officer or agent of such company in this State, and the unexplained refusal of such agent to accept such proofs of loss without objection thereto, was a sufficient compliance by the assured with the condition of his policy. Certainly, it must be said, under the rules of law applicable to the case as here presented, that there is evidence in the record which tends to prove, and from which the court or jury might reasonably infer the fact, that the assured had substantially complied with the conditions of his policy, both in giving notice and in rendering the particular account of his loss to the company.

But it is claimed that appellees cannot recover because they failed to put in evidence the plans and specifications and proofs of loss

mentioned in the testimony of the assured. Doubtless appellant had the right to object to the testimony, and to insist that no evidence should be heard in relation to the plans and specifications, and the proofs of loss, until they were produced at the trial, or satisfactory reasons given by appellees for their non-production. Appellant made no objection to the testimony of the assured, and did not as it might have done, call for and put in evidence the plans and specifications, and proofs of loss, mentioned by the assured.

Appellant's counsel say: "There can be no presumption that these papers were sufficient, when the plaintiffs, having them in their possession, or, at least having the assured, in whose possession they were, present and testifying on the trial, failed to put them in evidence." This argument, however, may be used with equal force against the appellant, thus: It may be fairly presumed against the appellant "that these papers were sufficient," both in form and substance, because, "having the assured, in whose possession they were, present and testifying on the trial," under cross-examination by its learned counsel, appellant did not ask the assured to produce "these papers," and "failed to put them in evidence."

It was shown by the evidence, as we have seen, that the assured tendered his plans and specifications, and the proofs of his loss, to appellant's agent, Rosenkrans, who refused to receive them; but made no objection, so far as the record shows, to either their form or substance. From the evidence, therefore, the court might have reasonably inferred that the plans and specifications, and proofs of loss, so tendered by the assured, were such as were called for by the conditions of his policy, and substantially complied with such conditions: *Indiana Ins. Co. vs. Capehart*, 8 N. E. Rep., 285.

But it is claimed that Rosenkrans was the agent of the assured, and not of the appellant by reason of the following condition in the policy, namely: "It is a part of this contract that any person, other than the assured, who may have procured this insurance to be taken by the company, shall be deemed to be the agent of the assured named in the policy, and not of this company, under any circumstances whatever, or in any transactions relating to this insurance." As applied to Rosenkrans and the policy here in suit, the condition quoted is, we think, absolutely null and void. By the terms of the policy, its validity and binding force were made to depend upon the counter-signature of J. L. Rosenkrans, "the duly authorized agent of the company at Mount Vernon, Indiana." The condition quoted no doubt "crouched unseen in the jumble of

printed matter with which a modern policy is overgrown," and it is a question, upon which the authorities are not slightly in harmony, whether such a condition can be made available as a defense for the company, after the loss has happened, against which the policy professed to guard: *Van Schoick vs. Niagara Fire Ins. Co.*, 68 N. Y., 434. In *Patridge vs. Commercial Fire Ins. Co.* (17 Hun., 95), in speaking of a condition very similar to the one last quoted, it is vigorously said by the supreme court of New York: "It is true that the policy contains that common provision, that any person other than the assured who may have procured the insurance, is to be deemed an agent of the assured, and not of the company. This is a provision which deserves the condemnation of the courts whenever it is relied upon to work out a fraud, as it is in this case. The policy might as well say that the president of the company should be deemed the president of the assured. * * * Such a clause is no part of a contract. It is an attempt to reverse the law of agency, and to declare that a party is not bound by his agent's acts. Whether one is an agent of another is a question of mixed law and fact, depending on the authority given expressly or impliedly, and when a contract is, in fact, made through the agent of a party, the acts of that agent in that respect are binding on his principal." *Indiana Insurance Co. vs. Hartwell*, 100 Ind., 566.

In the case in hand, we are of opinion that there is evidence in the record which tended to prove, and from which the court or jury might reasonably infer, that *Rosenkrans* was, and continued to be, in fact and in law, the duly authorized agent of appellant, and not of the assured.

The last point made by appellant's counsel which needs to be considered under the rules of law applicable to this case, is thus stated: "There was no evidence whatever of the value of the house, or of the furniture that was burned. No evidence that either was of any value. There is an entire absence of proof upon this question." The point thus made by counsel seems to be sustained by the record of this cause. If the question of excessive damages, or of error in the assessment of the amount of appellee's recovery, had been properly saved in the record, and presented here by a proper assignment of error, appellant might, perhaps, have been in condition to complain here of the assessment of appellee's damages; but this point we need not and do not decide, as the question is not before us. All that we need to decide is that, upon the case made by the evidence set out in appellant's demurrer, appellees were entitled to at least

nominal damages. Where there is a demurrer to evidence and a joinder, the court may have the damages assessed by the jury conditionally, or the jury may be discharged, leaving the damages to be assessed by another jury should the demurrer be overruled: *Andrews vs. Hammond*, 8 Blackfd., 540; *Lindley vs. Kelly*, 42 Ind., 294; *Strough vs. Grear*, 48 Ind., 100.

In the case under consideration when appellant demurred to appellee's evidence, the jury was discharged, leaving the damages to be assessed by another jury if the demurrer should be overruled. The record shows that, after the demurrer to the evidence was overruled, the assessment of appellee's damages was submitted to the court, neither party asking for a jury. The record is silent as to whether or not any evidence was heard by the court on the question of appellee's damages.

In such a case, we must presume, in aid of the finding and judgment, that all proper and necessary evidence was heard by the court on the question of the assessment of appellee's damages.

We have found no error in the record of this cause.

Judgment affirmed with costs.

SUPREME COURT OF OHIO.

CROSS

vs.

ARMSTRONG* }

Section 3,628 of the Revised Statutes, which provides that a person may effect insurance on his life for benefit of his widow or children, and the amount of insurance coming due shall be payable to such widow or children exempt from claims of the representatives and creditors of such person, but the amount of annual premiums shall not exceed one hundred and fifty dollars, and in case of excess there shall be paid to the beneficiaries such portion of the insurance as the sum of one hundred and fifty dollars will bear to the whole annual premium, and the residue to the representatives of the deceased, applies as well to a policy issued by a company organized and conducted outside the limits of Ohio as to a policy issued by a company of this State.

In a suit brought against the company, by the widow of such insured person, upon a policy in which she is named as the beneficiary, in a court in the State where such company is located, and in which suit, by direction of the court, the company brings into court a sum of money sufficient to satisfy the amount due on the policy, and obtains an order requiring the administrator resident of Ohio, to appear and interplead with such widow as to their respective claims under the policy, service in Ohio of copy of such order, and of citation, upon such administrator, does not give the court jurisdiction of his person, and a judgment in the action purporting to debar him from any claim or right, as against such widow, is, as to him, void.

The action below was commenced by the filing in the court of common pleas of a petition which, in substance, alleges: that the plaintiff is the administrator of William Armstrong; that the assets are insufficient to pay the debts, and that the defendant is the widow of the deceased. The intestate, April 26, 1870, effected an insurance upon his life for the sum of \$10,000, in the Provident Life and Trust Company, of Philadelphia, Pa., then doing business in

* Decision rendered, January 17, 1887.

Ohio as an insurance company, and caused the policy to be made payable on its face, to his wife, Polly Armstrong, the defendant. By the terms of the policy, the assured, William Armstrong, agreed to pay, and did annually pay, the sum of \$594, yearly premium for such insurance, from the date of the policy until the time of his death, which occurred March, 1879. The intestate at the time of his death, held the policy in his possession, at his domicile in Ohio. The deceased, the plaintiff, and the defendant, were always citizens of and domiciled in this State. After the death of the assured, the defendant obtained possession of the policy, collected of the company the entire amount secured thereby, and surrendered it to the company; and she now holds the sum of \$7,475.75 of the \$10,000 received by her, for the use of the plaintiff, as the representative of the deceased.

To this an answer was filed which alleges in substance:—

First. That the Provident Life and Trust Company is a corporation organized under the laws of Pennsylvania; that the insurance contract, mentioned in the petition, was effected in that State, to be performed and was performed in that State; and that by the laws of Pennsylvania, and by virtue of the contract, the right vested in the defendant to receive the whole of the insurance money secured by the policy for her sole use and benefit.

Second. That July 25, 1879, the defendant instituted a suit in a common pleas court, of the city of Philadelphia, upon that policy, against the insurance company, to recover the \$10,000 named therein; that before plea pleaded, the company came into court, and suggested that the administrator of William Armstrong claimed to have some interest in the insurance fund, and prayed for leave to bring the money into court, and for an interpleader between the said Polly Armstrong and the administrator of her husband, touching their rights, respectively, to the proceeds of such insurance; that such leave was granted, and a rule entered requiring the administrator to show cause why an interpleader should not be awarded between him and Polly Armstrong to determine their respective rights and ownership in the fund agreeably to the laws of Pennsylvania, a copy of which rule, under the seal of the court, was, pursuant to the laws of Pennsylvania and the practice in said court, delivered to said administrator, at the county of Tuscarawas and State of Ohio, together with a letter from the attorney of the company notifying him that under the laws of that State it was necessary for him to appear. Afterward, the rule being made

absolute, and the money having been paid into court, a citation was duly issued under seal requiring and summoning the administrator to appear in court and interplead, and notifying him that in case of default the money would be awarded to said Polly, and he declared estopped and debarred from any further right or claim therein, which citation, pursuant to the laws of Pennsylvania, was duly served on the administrator by delivering the same to him at said county of Tuscarawas. The administrator not appearing, the court adjudged and decreed that the entire fund be paid to Polly, and that the administrator be estopped and debarred from all claim to any part of said fund or in the policy of insurance.

To this answer the plaintiff interposed a general demurrer. The court of common pleas overruled the demurrer and rendered judgment for defendant, which judgment was affirmed by the district court. To obtain a reversal of these judgments the petition in error is filed in this court.

H. T. STOCKWELL, *for Plaintiff in Error.*

J. T. O'DONNELL and ALEXIS COPE, *for Defendant in Error.*

SPEAR, J.

The questions arising in the case are presented by the demurrer to the answer. It will be observed that there is no denial of the allegations that at the time of the effecting of the insurance upon the life of William Armstrong, he and the defendant were residents of and domiciled in Ohio, and that they continued to so reside until his death, and she has ever since resided within the State; that the premiums, \$594 each year, were wholly paid by the husband; that the debts of the estate are over three thousand dollars, while the assets are not more than seven hundred, and the defendant has received from the insurance company the entire amount of the insurance money covered by the policy, ten thousand dollars.

The claim of the plaintiff is based upon the statute of Ohio, section 3,268, while the defendant's claim is that the rights of the parties are measured by the laws of Pennsylvania, the place where the contract was made and was to be enforced, and that those rights have been adjudicated upon and determined by the decree and judgment of the court of common pleas of Philadelphia, set up in the second defense of the answer. It is urged that by the common law the contract of insurance is to be construed by the law of the place where made; that the law of that place governs as to the nature, obligation, and interpretation of the contract; that when

the plaintiff would have no right of action by the law of the State where the contract was made and to be performed, he can have none here, and that by the laws of Pennsylvania and by virtue of the contract the right vested in the defendant to receive for her own exclusive use the whole of the money secured by the policy.

Assuming, without holding, that the law of Pennsylvania is sufficiently pleaded in the answer, and that, unless the question is determined by the statute referred to, the claim made by the defendant as to the effect of the law of Pennsylvania upon the rights of the parties here is conclusive, how, if at all, are those rights affected by section 3,628 of the Revised Statutes? That section reads as follows:—

Any person may effect an insurance on his life, for any definite period of time, or for the term of his natural life, to inure to the sole benefit of his widow and children, or of either, as he may cause to be appointed and provided in the policy; and the sum or net amount of insurance becoming due and payable by the terms of insurance shall be payable to his widow, or to his children, for their own use, as provided in the policy, exempt from all claims by the representatives and creditors of such person; but the amount of premium annually paid on such policy shall not exceed the sum of one hundred and fifty dollars, and, in case of such excess, there shall be paid to the beneficiaries named in the policy such portion of the insurance as the sum of one hundred and fifty dollars will bear to the whole annual premium, and the residue to the representatives of the deceased.

In obtaining an insurance of this kind the manifest intent of the husband is to make provision for those dependent upon him, a purpose every way rightful and laudable. It is to be done by applying, from year to year, the money of the husband, obtained from proceeds of his own labor or otherwise, to the future use and benefit of those who stand in such relation to him as to give them a natural claim to his efforts, forethought, and bounty. And up to a certain point, as to expenditure, such provision may legally be made. In the same spirit our laws allow to the widow dower in lands, use of the mansion house one year, a homestead right, a year's support out of the personalty, a given proportion of the residuum after debts are paid, and certain specific articles of personal property, if such the deceased possessed. But the same laws recognize others as having rights as regards the property of the deceased. The creditors are not to be wholly ignored, even though there be a needy widow and needy children. As to the section referred to, while it recognizes the right of the husband to make provision for those of the family who may survive, to the extent of one hundred and fifty dollars.

yearly thus invested, it also provides that as to insurance effected by payments over that sum it shall inure to the legal representatives. No question is made that as to contracts with Ohio companies the statute would apply. Should it receive such construction as to confine its operation to that class of contracts? It is not doubted that it is competent for the General Assembly to enact laws which in effect forbid citizens of the State from resorting to the courts of sister States for the purpose of defeating the operation of laws of Ohio as to questions which affect the rights of other citizens of Ohio. The law which gives to a debtor, the head of a family and not the owner of a homestead, an exemption as against a claim of a creditor in attachment where the sum due the debtor is shown to be necessary for the support of the family, is a law of that kind, inasmuch as it is held that such creditor may be enjoined from bringing action in courts out of Ohio where no such exemption could be permitted. And the law in question, if it applies to policies issued by companies other than those organized in Ohio, is an inhibition against citizens of Ohio placing moneys beyond the reach of creditors by entering into contracts with insurance companies organized out of this State. It will be noticed that the words of the statute do not limit its application. The language is comprehensive, and in terms it applies to all contracts of insurance obtained by citizens of the State. Why should we assume that the legislature intended that if the company happens to be a home company the statute applies, while if one located in another State it does not apply? Why not assume rather that that body intended to correct the mischief which the very enactment of the statute raises the implication then existed? It is but the ordinary rule to give such construction to statutes as will advance the remedy and correct the mischief. Applying the law only to home companies would, in great measure, defeat the very purpose apparent in this legislation. The General Assembly must be assumed to have at least such general and common knowledge upon subjects of legislation as is possessed by citizens at large, and it is matter of common information that the great proportion of policies written upon the lives of citizens of Ohio are issued by companies organized outside the State, and there is little doubt that this was true in a larger sense even at the time this statute was enacted (1847) than it is now. Statistics, believed to be reliable, show that in the year 1884, out of about fifteen thousand policies and certificates written upon the lives of citizens of this State more than ten thousand were

written by foreign companies, and out of thirty-three millions of dollars gross amount covered by these policies and certificates, nearly twenty-five millions were in policies issued by foreign companies. It is probable that, prior to the organization of the various relief and aid associations, now so common, the disproportion was greater than the above figures show.

The parties to this litigation are citizens of the State of Ohio and were when rights under this policy accrued. Those rights are being adjudicated in the courts of Ohio. Why should those courts ignore our own law, or make it subordinate to the law of another State? We think they should not. To do so would permit a citizen largely indebted to invest his capital and earnings to an unlimited amount for the benefit of members of his family in insurance contracts in distant States, thus working a fraud upon deserving creditors by placing such sums beyond their reach, notwithstanding such investments would be, in spirit, a plain violation of the whole policy of our laws regulating the respective rights of debtor and creditor. Very much more might be said in elaboration of this view, but we deem it unnecessary to take further space, as we feel confident that enough has been indicated to make it clear that the demurrer as to the first defense of the answer, was well taken and should have been sustained.

Does the second defense set up in the answer stand in the way of a recovery? The contention on part of defendant is that by the judgment of the Philadelphia court the matter in issue here is res adjudicata, and this is so if that court had jurisdiction of the subject-matter and of the person of the plaintiff. The record shows that the service on the plaintiff was by delivering to him in Ohio a copy of the rule of court requiring him to show cause why the court should not give direction to the company to bring the \$10,000 owing by it on the policy into court and why he should not interplead with Mrs. Armstrong as to conflicting rights to such money, together with a letter from the company's attorney advising him to appear, and by like service afterward of a copy of a rule absolute, and of citation to appear and interplead. Is such notice sufficient to require an Ohio administrator to go to another State to litigate in the courts of that State with a citizen of Ohio, questions arising under the laws of Ohio affecting the estate which he represents, or refuse at his peril? It is probable that no injustice would in this case be done if the question were put in this way: Can a resident of Ohio resort to the courts of another State and

there compel an administrator, resident of Ohio, and deriving his authority from the courts of this State to litigate a dispute existing between them, wherein the rights of the administrator depends upon the law of Ohio for the express purpose of evading the effect of our statute, and of obtaining a judgment which would be contrary to the law of the domicile of both?

It is urged that when the company asked that an interpleader be awarded, and brought the money owing by it into court, the court then obtained jurisdiction of the fund, and from that time forward the proceeding was one essentially in rem, and the court, having thus obtained jurisdiction of the res, and having given notice according to the laws of Pennsylvania had ample power to hear and determine, and having so heard and determined, the parties are bound by the judgment. That such proceeding could be in rem seems a novel doctrine. "In rem" is understood to be a technical term, taken from the Roman law, and there used to distinguish an action against the thing from one against the person, the terms in rem and in personam always being the opposite, one of the other; an act in personam being one done or directed against a specific person, while an act in rem was one done with reference to no specific person, but against, or with reference to a specific thing, and so against whom it might concern, or "all the world." A proceeding brought to determine the status of the thing itself, the particular thing, and which is confined to the subject-matter in specie, is in rem, the judgment being intended to determine the state or condition, and, ipso facto, to render the thing what the judgment declares it to be. While a proceeding which seeks the recovery of a personal judgment, is in personam. In the former, process may be served on the thing itself, and by such service and making proclamation the court is authorized to decide upon it without other notice to persons, all the world being parties, while in the latter, in order to give the court power to adjudge, there must be service upon those whose rights are sought to be affected. As regards rights, the terms signify the antithesis of "available against a particular person," and "available against the world at large." Thus jura in personam are rights primarily available against specific persons, jura in rem rights only available against the world at large."

Beyond this, a judgment or decree is in rem, or in the nature of a judgment in rem, when it binds third persons, such as the sentence of a court of admiralty on a question of prize, or a decree of other courts upon the personal status or relation of the party, such

as dissolution of marriage contract, bastardy, etc., a decree in probate court admitting a will to probate and record, granting administration, etc., or a decree of a court of a foreign country as to the status of a person domiciled there. We quote from Freeman on Judgments the definition of judgment in rem given by that author. "An adjudication against some person or thing, or upon the status of some subject-matter, which, wherever and whenever binding upon any person, is equally binding upon all persons." In contrast, a judgment in personam is, "in form as well as substance, between the parties claiming the right; and that it is so inter partes appears by the record itself." *Woodruff vs. Taylor*, 20 Vermont, 65.

From all which it appears that a judgment in rem, at least when against any thing, may bind the res in the absence of any personal notice to the parties interested, but a judgment in personam, as we have seen, can have no validity except upon service on the interested parties, or what is equivalent to it. Why was the Philadelphia action, in its nature, not a proceeding between parties claiming right to money due under the policy, rather than a proceeding to determine the status of such money? If it was the former, then the efficacy of the judgment depended upon having the parties before the court so that their conflicting claims could be adjudicated; if the latter, then it would appear to be one wherein the court's judgment would have been effectual and conclusive without reference to whether the parties were before the court or not, and the rights of both of them could have been as well settled by the filing of a bill by the insurance company and the bringing of the money into court, and without the presence, by service or appearance, of either of the parties claiming to be interested in the fund. It was not the status of any particular money that was to be determined, for any money which was a legal tender would have effectually satisfied the claim of the party receiving it, nor was there any claim primarily, by even the widow, much less the administrator, to any money in specie, nor did either the company or the widow, at any time, claim or admit that the administrator had any money or property within the jurisdiction of the court, or valid claim to any subject-matter sought to be effected by the decree to be rendered. The proceeding was clearly one of interpleader, and that only.

We do not understand that an action in personam, simply because a debtor brings money, the right to recover which is in contention, and gives to the custody of the court a sum sufficient to discharge

his debt, changes into an action in rem, or that an interpleader suit is, in its nature, a proceeding in rem. In the Philadelphia case the company could have begun the action by original bill and obtained a complete standing in court, if, with other proper averments, the pleader had alleged a willingness to bring the money into court. Manifestly the action thus begun would not have been in rem. Then, does the mere fact that the company (the debtor), being sued, voluntarily delivers money to the clerk of the court rather than keep it in its own safe, or to its credit in bank, or loaned upon call, change the action from one in personam to one in rem? We think not.

It will be borne in mind that the Philadelphia suit was essentially unlike an attempt to reach, by process of attachment, the property of an absent party. It was rather an attempt to estop the administrator from claiming any recovery against the company, to draw the estate of William Armstrong to a distant State for settlement, and an attempt to compel the administrator to litigate, against his will, in a Pennsylvania court a controversy affecting the estate, and with another resident of Ohio; hence the class of cases which treat proceedings in attachment as substantially proceedings in rem have no application to the case at bar.

If the case made in the answer cannot be treated as a suit in rem, it appears clear that the judgment rendered is void as against the administrator for want of jurisdiction at least of his person. No support is given that judgment by the constitutional provision and the act of Congress of 1790, passed pursuant to it, which gives in all States the same faith and credit to a judgment of a State as it has by law or usage in the courts of the State where rendered; for, whatever strict construction was given that provision by the earlier decisions, it is now well settled that parties sought to be affected by a judgment rendered in another State are not precluded from showing that the court wherein the action was pending had no jurisdiction either of subject-matter or of the person, for in order to entitle a judgment rendered to such full faith and credit the court must have had jurisdiction as well of parties as of subject-matter.

The law on this point is well stated by Johnson, J., in *Pennywit vs. Foote*, 27 Ohio St., 618, as follows: "From a careful review of numerous cases, we find the rule now well settled that neither the constitutional provisions, that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, nor the act of Congress passed in pursuance

thereof, prevents an inquiry into the jurisdiction of the court in which the judgment offered in evidence was rendered, and such a judgment may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist, and this is true either as to the subject-matter or the person, or in proceedings in rem as to the thing." The State of Pennsylvania could not extend its sovereignty into the State of Ohio; it could not, in an action in personam, compel a citizen of this State to respond to the process of its courts served in this State." No sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals: Story on Conflict of Laws, § 539. "The jurisdiction of State courts is limited by State lines, and upon principle it is difficult to see how an order of court, served upon a party out of the State in which it is issued, can have any greater effect than knowledge brought home to the party in any other way. Mere knowledge of the pendency of a suit in the courts of another State without service of the process, or an appearance, is not sufficient of itself to compromise the rights of the party in this State:" *Ewers vs. Coffin*, 1 Cushing, 23. The conclusion we have reached is strengthened by a consideration of the policy and provisions of our statute which directs in what county an administrator may be sued. Section 5,031 of the Revised Statutes provides that actions against an executor, administrator, guardian, or trustee, may be brought in the county wherein he was appointed or resides, in which case summons may issue to any county. When so careful a provision is made as to the situs of suits against administrators in this State, and while under the section referred to, this widow would have been confined to the limit above indicated in the bringing of an action in Ohio to settle the rights of the parties to the amount due on the policy, it would seem strange indeed if she could, by choosing a court in another State, compel the administrator to follow her there to defend the claim of the estate he represented. We are of opinion that the demurrer to the answer should have been sustained. Judgments reversed.

SUPREME COURT OF NEBRASKA.

WESTERN HORSE & CATTLE INS. CO.)

vs.

PUTNAM.*

Evidence was offered that an animal lost, if of a kind stated, was worth \$800, but under certain stated conditions the value would be destroyed.

Held, That a verdict based on such hypothetical testimony will not be disturbed if no other evidence of value is given.

The policy provided that if upon investigation the claim for loss proved correct it would be paid in a specified time; also that no animal should be insured for more than three-fourths of its value, and if found insured for more, only three-fourths should be paid, and in case of dispute the value to be determined by arbitration.

Held, That a denial of the validity of the policy was a waiver of arbitration.

BAERNES BROS., *for Plaintiff*.

W. E. GANTT and W. F. NORRIS, *for Defendant*.

REESE, J.

This was an action on a policy of insurance, executed by plaintiff in error to defendant in error, by which the plaintiff in error insured a certain jack—or “stallion ass,” as it is termed in the policy—for the sum of \$300, the real value for which was stated in the application for insurance at \$400. The petition is in the usual form. The answer denies all the allegations of the petition, except the issuance of the policy, and the corporate existence of plaintiff in error, defendant below. The answer contains the further defense that, in order to induce plaintiff in error to issue the policy of insurance, defendant in error made a written and printed application for said policy, and in said application falsely and fraudulently represented

* Decision rendered. November 10, 1886.

to plaintiff in error that the animal to be insured was in a good state of health, and of the value of \$400, "which said representations, by the terms of said policy, were made a part thereof, and the basis upon which the same was issued; and it was further provided by the terms of said policy that should said representations prove false and fraudulent, that said policy should be void." It is alleged that said representations and statements were false and fraudulent; that the animal was not in a good state of health, but was at said time "sick, lame, and diseased, and for more than five months prior to said date had been diseased with a large sore on one of his forelegs; that it was not of the value of four hundred dollars, or any other sum, because he was unfit, by reason of said sickness and disease, for the purpose for which he was kept, to wit, as a stallion ass, and could not get colts,—all of which said plaintiff knew at the time." It is alleged that defendant falsely and fraudulently represented that the animal insured was only six years old, when in fact it was much older,—so old as to be worthless,—which defendant in error well knew; that said false representations were made to procure the issuance of the policy, and were relied on by plaintiff in error; that, after procuring the policy, defendant in error failed to furnish proper and suitable stabling for the animal insured, but kept it during the storms of winter under an open shed, and exposed to the storms and the inclemency of the weather, and by reason of the disease, old age, and exposure the animal died. The reply denied all the allegations of the answer. A jury trial resulted in a verdict and judgment in favor of defendant in error for the full amount of the policy. The insurance company prosecutes error to this court.

It is first insisted that, by the allegations of the answer, the value of the animal was put in issue, and that, in order to recover, it was necessary for defendant in error to establish such value by competent evidence. Upon the part of defendant in error it is insisted that the value of the property was not in issue, but that, if it were, it was sufficiently proved. Conceding that the value of the insured property was in issue, we must hold that there was some competent evidence as to such value. J. E. Bennett, a witness of seventeen years' residence in Dixon County, was called by defendant in error for the purpose of proving the value of the property. He showed himself competent to testify upon the subject of the value of such animals. He had never seen the one in question. A hypothetical question, fairly reflecting the testimony offered by plaintiff as to

the condition of the jack at the time of the insurance, was propounded to him in connection with the inquiry as to the value of the animal. His answer was that, if he was healthy,—a straight, nice jack, otherwise than as stated in the interrogatory,—he would be worth \$800. He was then asked what would be the effect on the capacity of such an animal for getting foal by driving him, in the spring of the year, 350 miles in fourteen days. The answer was, in substance, that he would be worthless; giving, as a reason for his answer, the “change of climate in the mare season;” and that not one out of twenty-five would ever get a colt, but that he would be good after that. Much stress is laid on this testimony by plaintiff in error, which, it is claimed, destroys the effect of the testimony of the witness wherein he fixes the valuation at \$800. We do not so consider it. In the former part of his testimony the witness refers to the general valuation of the property; in the latter, he refers only to the value for the year in which it was brought to the State. It may be true that the testimony is not of very great weight, but, in the absence of any other, it was sufficient for the jury to consider, they being the judges of its weight. No testimony upon the question of value was introduced by plaintiff in error, except in a general way,—showing his condition, failure to perform service, etc.,—while the proof of some value, introduced on the part of defendant in error, was abundant. Some testimony was admitted as to the value of such property in the market in Missouri, and to which objection is made; but, if there was error in admitting it, it was clearly without prejudice under the issues. In this connection it must not be forgotten that the only issue of value presented by plaintiff in error was as to the worthlessness of the property at the time of insurance, as tending to prove fraud on the part of defendant in error in procuring the policy. As fraud is never presumed, but must be proved by the party alleging it, we think there was sufficient proof of value to sustain the verdict.

The policy contains the following condition: “No animal shall be insured for more than three-fourths of its actual value. Whenever, in case of loss, it shall be found upon investigation, that the animal was insured for more than that, the company will pay the insured only three-fourths of such actual value, and no more, if such loss be found correct and just; the actual value to be determined by three disinterested persons, unless agreed upon between the insured and the company.” It is insisted that this condition is binding upon the parties to the policy, and the court erred in admitting any evidence

as to the value until it was shown that the company had refused to permit the value to be fixed and determined by arbitration, or had in some manner waived the condition.

The fifth clause of the policy provides that "when all necessary documents have been received, the company will cause losses to be properly investigated; and, if the same shall prove correct and just will settle them within forty-five days after the establishment of such proof." The "investigation" provided for in the fifth clause is, without doubt, the one referred to in the fourteenth. There is no suggestion anywhere in the pleadings or proof that the plaintiff in error ever sought to avail itself of the benefits of the provisions of the policy now invoked; but, upon the contrary, it refused absolutely to pay anything, declaring that, as to it, the policy was void.

Had it been ascertained that the property was insured for more than three-fourths of its actual value, and had plaintiff in error so notified defendant in error, and had it acknowledged its obligation to pay the correct amount, then it might have insisted on an arbitration of that question. Having refused to pay, without claiming anything under the article in question, it has waived any right to insist upon it in bar of the action: *May, Ins.*, § 492; *Robinson vs. Georges Ins. Co.*, 17 Me., 131; *Goldstone vs. Osborn*, 2 Car. & P., 550; *Kill vs. Hollister*, 1 Wils., 129; *Thompson vs. Charnook*, 8 Term R., 139; *Street vs. Rigby*, 6 Ves., 815.

Objection is made to the fourth instruction given to the jury. It is as follows: "The defendant in its answer alleges and claims that it is not liable on said policy for the reason as alleged, that the defendant was induced to assure said animal by the false and fraudulent representations of plaintiff as to the age, value, soundness, and health of the animal at the time of the issuance of the policy. This is denied by the plaintiff in his reply. Defendant further alleges that said ass died from disease contracted prior to the insurance, from old age and exposure, and that the animal was old and worthless at the time of the taking effect of the policy. The allegations are also denied by the plaintiff in his reply, and these are the issues for you to determine." It is said that "this instruction is misleading, in that it entirely ignores the question of the value of the property insured." From a careful examination of the answer, we think the instruction was correct. As we have seen, there are but two lines of affirmative defense presented by the answer,—one, the invalidity of the policy by reason of the false representations and fraud practiced by defendant in error in procuring the execution of

the policy; the other, negligence in caring for the property after insurance. The question presented for trial was the liability of plaintiff in error on the policy for any sum whatever.

The objection to instruction No. 6 is disposed of by the foregoing, and no further notice of it is necessary.

The next and last contention is that "the verdict is not sustained by sufficient evidence, and is contrary to law." The testimony was mainly confined to the issues made by the pleadings. There was sufficient to warrant the jury in finding that, at the time of the insurance, the agent of plaintiff in error was at the house of defendant in error; that he examined the animal; that it was a very large one, in good condition, except a healing sore on one of its forelegs, (which was afterwards cured), and that the animal was about six years old; that it was worth more than the sum named in the application for the policy; that it was reasonably well cared for, and died from disease, through no fault or negligence of defendant in error. There being sufficient evidence to sustain the finding of these facts, it cannot be molested.

The judgment of the district court is therefore affirmed.

SUPREME COURT OF ILLINOIS.

GOLDEN RULE

vs.

PEOPLE, EX. REL. SWIGERT, AUDITOR OF STATE.

A relief society where the object is the benefit not of widows of deceased members or members who have received a permanent disability, but of certain members themselves, and the appointee of the insured, must be deemed an insurance company and not a benevolent society, within the statutes of Illinois.

SHELDON, J.

This was a proceeding by information in the nature of a quo warranto against the Golden Rule and its directors. The information contains three counts. The first sets forth the organization of the Golden Rule as a body corporate under the general incorporation law approved April 18, 1872 (Rev. Stat. 1874, P. 290), and its mode of doing business, and avers that it has usurped, and now usurps, power and franchises not conferred by law; the second avers that the corporation has wrongfully and without warrant of law engaged in and transacted a life insurance business, and is therein wrongfully usurping power; and the third count sets forth that it has unlawfully usurped and exercised powers and franchises in respect to its so-called "relief fund," and is so doing. To this information two pleas were filed, one by the corporation and the other by the directors. These pleas set forth all the facts concerning the organization, objects, operation, and business of the corporation, its constitution and by-laws, etc., and deny that it has exercised any power or franchise not warranted by law. A demurrer was sustained to the pleas.

* Decision rendered, November 13, 1886.

The defendants have appealed to this court, and assign for error the decision of the circuit court in sustaining the demurrer and entering judgment of ouster.

Among the objects of the association as set forth in the pleas are:

Second, to aid its members in the struggle incident to life, and to assist its sick and distressed members in every way they may be suggested by a refined humanity.

Third, to establish a fund by voluntary contributions for the benefit and relief of the widows and orphans of deceased members; thereby securing the blessings of independence to those who otherwise might be left in poverty.

Fourth, to give material aid to those who through a long series of years may have had their charity drawn upon by frequent and continued contributions, thus securing in old age a realization of mutual aid and protection.

Section 1, article 4 of its constitution is.

ARTICLE 4.

Section 1. The supreme council shall establish by voluntary contributions from the members of the order a relief fund, from which, upon the death of a member, an amount not exceeding \$1,500 shall be paid to such person or persons as shall have been designated by such deceased member, and a sum not to exceed \$500 shall be distributed in accordance with the custom and laws of the order, and the subordinate councils shall have authority to establish a charity fund by voluntary contributions from the members of the order, to be devoted to the relief of worthy distressed members.

In section 2 of the by-laws it is declared:

Section 2. The relief fund shall consist of contributions received from the members upon the death of a member. The amount so raised shall be distributed as follows: Seventy-five per cent, not to exceed \$1,500, to the widow, orphan, or other dependent, as deceased member shall have directed in his or her application for an interest in said fund, and 25 per cent, not to exceed \$500, equally between the two members holding valid and existing certificates next in number both above and below the number of the certificate of such deceased member.

If there is an excess in the amount so raised it shall remain in the relief fund; and when such fund contains \$2,000 then it shall be used to pay the beneficiaries, and no contributions will be asked. Out of the amount contributed for the relief fund the supreme council may appropriate a sum not to exceed 10 per cent to the expense fund of supreme council. The supreme council shall cause to be paid to the beneficiaries of deceased members the contributions received within sixty days after due notice of death.

The form of application for an interest in the relief fund given in the pleas, after stating that all answers to the medical examiner are true, proceeds: "I desire my interest in said fund, being a sum not to exceed \$2,000, of the amount contributed at my death, to be paid as follows: 75 per cent, not to exceed \$1,500 to ———, and

the residue, 25 per cent, equally to those persons who hold valid certificates in the relief fund department numbered next above and next below the number of my certificate. I declare this to be my last will and testament as regards my interest in the relief funds of this order."

The pleas give the form of the certificate issued, whereby the holder is declared to be entitled to an interest in the relief fund as above set forth. The pleas state that the practice of the supreme council is to number the certificates according to the age of the member, instead of the order in which the applications are received, "so that the certificates of the older members would bear numbers between certificates of the younger members, and thus, by giving the younger members of the fund the prospect of receiving back some part of the contributions made by them, would encourage them to contribute thereto, and continue their membership in the order;" that all the payments which are required to be made by members is a membership fee for charter members of five dollars; for subsequent members seven dollars; and a semi-annual due of fifty cents, which are devoted exclusively to expenses.

According to the showing of the pleas, we are of opinion that this corporation is in the exercise of powers not conferred by law. A corporation can only organize under this act above mentioned "for any lawful purpose except insurance," section 1 of the act. By the last clause of section 31 of the act, it is provided that societies intended to benefit the widows, orphans, heirs, and devisees of deceased members thereof, and members who have received a permanent disability, and where no annual dues or premiums are required, and where the members shall receive no money as profit or otherwise, except for permanent disability, shall not be deemed insurance companies. Here is the strongest implication that a society doing such a business as the pleas present is doing an insurance business, and that it is to be deemed an insurance company. Not to be deemed an insurance company under the act, it must be intended to benefit the widows, orphans, heirs, and devisees of deceased members and members who have received a permanent disability, and where the members shall receive no money, as profit or otherwise, except for permanent disability. But here the declared object is the benefit of members; and the pecuniary benefits are enjoyed, not by the widows, etc., of deceased members and by members who have a permanent disability, but by the appointees of deceased members, the beneficiary named in the application and by certain of the

members generally, and not by members who had received a permanent disability.

It is urged that there are no assessments made on members to pay the benefits; that the relief fund is constituted solely by the voluntary contributions of members. When a death occurs of a member entitled to the benefits of the relief fund, the secretary is required to give notice of the fact to each member of the Order of the Golden Rule who is asked to make contributions to the relief fund, but no penalty whatever attached for not contributing, it being entirely voluntary to do so or not. Although there be no compulsory means of raising the relief fund, and it consists solely of donations made as thus stated, there is certainly expectation that the fund will be raised, and when raised there is an absolute obligation to distribute it to the persons named. The relief fund forms an important part of the society's scheme, and is doubtless a main inducing reason for becoming a member of it, rendering it highly improbable that it will not be provided in the mode pointed out. When the contributions are received, 75 per centum of the amount, not exceeding \$1,500, is required to be paid to the beneficiary named in the certificate of the member, and 25 per cent, not exceeding \$500, is to be divided equally between the two members holding certificates numbered next above and below the number of the deceased member's certificate. Although the constitution of the society provides that this amount of 75 per cent shall be paid to such persons or person as shall have been designated by the deceased member, and the certificate states that it shall be paid over to the person named in such person's application; it is said, the person named, must, under the laws of the order, be a widow, orphan, or dependent. The foundation for this statement appears to be the provision in the by-laws that the money shall be distributed to the widow, orphan, or other dependent as the deceased shall have directed in his application. Even under this provision, a dependent may be designated, and a dependent is not necessarily of the class of persons designated in the above-named section 31 of the law under which the corporation was created, viz.: widows, orphans, heirs, and devisees.

But passing this feature of the payment, the requiring of the 25 per cent of the amount to be paid to the two members who happen to hold certificates next in number to that of deceased, marks the transaction as unlawful life insurance business, as to be deemed such under said section 31 of the statute. These two members are not members who, as named by this section, have received a permanent

disability, nor are they members who "receive no money as profits or otherwise except for permanent disability." They become entitled to the money simply by chance, from holding certificates which happen to bear certain designated numbers. The affair is in the nature of a wager-policy. This case was before this court on a former occasion (*People vs. Golden Rule*, 114 Ill., 23), and, although there was there involved but a question of practice, we took occasion there say this much with regard to the merits of the case: "Although the payment of dues to a corporation on account of fees or assessments upon its members may be purely voluntary, persons may require legal rights to share in them when they are paid. * * * At present we do not perceive why the payment of a premium to one who holds a number next to that held by one who dies, and solely because he does die, is not, in effect, in the nature of a wager upon the life of one in whom the party thus benefited has no interest, and why, therefore the transaction is not within the condemnation of the principle announced in *Guardian Mut. Life Ins. Co. vs. Hogan*, 80 Ill., 35. And see also to like effect *Conn. vs. Wetherbee*, 105 Mass., 149; *State by Standard Life Ass'n*, 38 Ohio St., 281."

After more full consideration our views now coincide with what we then said. The circumstances of the relief fund not being made up from fees and assessments, but of purely voluntary contributions, does not, in our opinion, make any difference.

Judgment affirmed.

SUPREME COURT OF WYOMING.

JOHNSON
vs.
HOME INS. CO.*

It is not sufficient in the complaint to merely refer to the copy of the policy which is attached as an exhibit, to show the nature of the property insured, its location, and the term of insurance, such facts should be specifically set forth in the complaint itself.

Such copy of the policy will not be looked to on demurrer to aid the sufficiency of the pleading.

NELLIS CORTELL and C. P. ARNOLD, *for Plaintiff in Error.*

W. J. McINTYRE and JOHN H. SYMONS, *for Defendant in Error.*

BLAIR, J.

The sole question presented for the decision of the court in this case is, did the court below err in sustaining the amended demurrer filed by the defendant in error to the plaintiff's petition.

The alleged causes of demurrer are as follows:—

First. That the court has no jurisdiction of the person of the defendant or the subject of the action, for the reason that the nature of the allegations constituting the plaintiff's cause of action, as set forth in said petition, are such that they are properly cognizable only in a court of equity.

Second. That there is a defect of parties plaintiff, in this, that it appears upon the face of said petition, that said action is brought by the wrong plaintiff, and that John S. Purcell and W. A. Williams are the proper parties plaintiff, and are necessary parties to said suit.

* Opinion filed, April 21, 1885.

Third. That the petition does not state facts sufficient to constitute a cause of action.

Assuming that the pleader, when he made his assignment of alleged errors in the order given above, had in mind and fully recognized the truth of the old saying that the best of the wine should always be reserved for the last of the feast, I will consider the last assignment first, namely, that the petition does not state facts sufficient to constitute a cause of action.

Whether the old rule that a demurrer only admits what is well pleaded, or whether, as decided in the case of *Stewart vs. Balderston*, reported in 10 *Kansas*, that under the code practice, every thing stated should be taken as true, whether well pleaded or not, I deem it unnecessary in this case to discuss. Let it suffice for me to say that the defendant, by his demurrer, admits the truth of the allegations in the plaintiff's petition, at least in so far as is necessary to determine the question raised, if no farther; but challenges the right of the plaintiff to recover upon the facts stated.

By a careful examination of the plaintiff's petition, I am fully satisfied that the court below committed no error in sustaining the defendant's demurrer.

The first defect in the plaintiff's petition is, that it wholly fails to state the kind or character of the property insured, or where located, whether on American soil or on the ever-burning sands of the Desert of Sahara.

The pleader contents himself by merely averring that on the ninth day of August, A. D. 1883, at the town of Laramie City (now city of Laramie), in the county and territory aforesaid, the said defendant upon written application, first duly made, in consideration of a certain premium, to wit: "The sum of twenty-eight dollars to the said defendant then paid, did by a certain policy of insurance of that date, duly executed, insure one W. A. Williams against loss or damage by fire, to the amount of four thousand dollars, a true and correct copy of which said policy of insurance is hereunto attached, marked exhibit 'A,' and is hereby made a part hereof."

It will be observed all that is alleged in this allegation, is that, on the day named, in the county of Albany, that the defendant in consideration of the sum of twenty-eight dollars, did insure Williams (generally) against loss or damage by fire, to the amount of four thousand dollars. Nor does it appear in any other part of the petition what kind of property was insured, but leaves the de-

fendant and the court free to determine for themselves whether it was real, personal, or mixed, and where located.

The only other remote allusion in the petition to the property insured is as follows: "And the said plaintiff further avers that afterwards, on the eighth day of September, A. D. 1883, the property insured became and was consumed and wholly destroyed by fire."

The able counsel for the plaintiff in error contended in his argument before this court, that inasmuch as the policy of insurance discloses the character of the property insured, its location, and the country and territory it is in, that the defect complained of—if it be a defect—is cured; particularly, in view of the fact that the policy of insurance is made by an express averment a part of the petition. This contention of counsel of the plaintiff in error brings to the front the question, whether under our code the pleader can make an exhibit, even if it be the foundation of the action, a part of the petition.

Section 114 on page 47, of the compiled laws of this territory, reads as follows:—

If the action, counter-claim, or set-off, be founded on account, or a note, bill, or other written instrument, as evidence of indebtedness, a copy thereof must be attached to and filed with the pleadings.

It would seem, therefore, from the wording of this section, that the pleader has not the authority of the statute, nor can he make an exhibit a part of the petition, and if he seeks to do so by averring that it is a part thereof, it can have only the force and effect it would have if attached to and filed with the pleadings, namely, as evidence of indebtedness, nothing more, nothing less.

It has been repeatedly held that the copy attached and filed with the pleadings, forms no part of the pleading, and that the exhibit will not be looked to on demurrer to the pleading to aid its sufficiency: *Larimore vs. Wells*, 29 Ohio St., 13; *Watkins vs. Brunt*, 53 Ind., 208; *Cairo & Fulton R. R. vs. Parks*, 32 Ark., 131; *Roseling vs. McFarlin*, 38 Mo.

To grant the correctness of the contention of the counsel for the plaintiff in error, would be to say that the omission of all, or of any one of the necessary and material averments required in a petition to constitute a cause of action, can be supplied by reference to an exhibit when it is averred that the exhibit is made a part of the pleadings. Surely this cannot be done. The petition and the petition alone, must state the necessary and material facts constitut-

ing a cause of action. If it does not, it must be held bad on demurrer: *City of Los Angeles vs. Signoret*, 50 Cal., 298.

The Supreme Court of Arkansas has held that a reviewing court will look at an exhibit so as to sustain the ruling of the court below on demurrer when the exhibit is made a part of the record: *Buckner vs. Davis*, 29 Ark., 444; also *Holman vs. Patterson*, 29 Ark., 357, 362. But I know of no State, save one, in which it has been held that the court will look to an exhibit to supply the omission of a material allegation in the petition, even though the exhibit can be and is made a part of the petition.

Again, while the petition alleges that it was on the ninth day of August, A. D. 1883, that the policy of insurance was executed and delivered by the defendant to Williams, it wholly fails to state for what period of time the defendant insured Williams against loss and damage by fire, whether for one day only, or during the natural life of said Williams, or the existence of the company, or both.

This omission, I hold, is fatal, and cannot be cured by fishing amongst the exhibits to ascertain how the matter is.

Still again: The petition alleges that the property insured was destroyed by fire on the eighth day of September, A. D. 1883, but whether the policy of insurance was still alive and in force on that day, or whether its spirit had long before that eventful day taken its flight, the petition is as silent as the grave; an allegation in the petition that the policy of insurance was in full force and effect, and had not expired, or been canceled at the time the property was consumed by fire, is an indispensable averment, for without it the plaintiff's claim of right to recover would be at best the merest delusion, even if no demurrer was interposed.

There was a multitude of other points argued and assumed by counsel raised by the defendant's demurrer, and which the court was asked to decide. I do not deem it necessary or prudent to do so. Not necessary for the reasons I have given above, it being too evident that the judgment of the court below must be affirmed. Not prudent, lest a like atmospheric phenomenon should be again created, as one of the counsel who argued this case for the plaintiff in error declared existed when he exclaimed, "that the very atmosphere was filled with interrogation points." The judgment of the court below sustaining demurrer affirmed.

All the judges concurred.

SUPREME COURT OF WISCONSIN.

Appeal from County Court, Milwaukee County.

SAVELAND

vs.

FIDELITY & CASUALTY CO.* }

Where a party claims compensation from an accident insurance company for a period during which he was unable to work in consequence of an accident, and the policy expressly provides for compensation for the period of continuous total disability only, an instruction to the jury that by total disability was meant inability to do substantially all kinds of his accustomed labor to some extent, is erroneous.

March 14, 1884, the plaintiff, by occupation a merchant grocer, in Milwaukee, in consideration of \$15 by him paid, procured of the defendant a policy of insurance, whereby it insured the plaintiff for the term of twelve months ending March 14, 1885, and issued to him its policy, wherein the defendant, among other things, agreed in effect, that "if the insured shall sustain bodily injuries, * * * effected through external, violent, and accidental means, which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to his occupation, then, on satisfactory proof of such injuries, he shall be indemnified against loss of time thereby in a sum not exceeding \$15 per week for such period of continuous total disability as shall immediately follow the accident and injuries aforesaid, not exceeding, however, twenty-six consecutive weeks from the time of the happening of said accident;" which policy was

* Decision rendered, November 3, 1886.—From *N. W. Reporter*.

so issued to the plaintiff, "and accepted" by him, "subject to all the provisions, conditions, limitations, and exceptions" therein "contained or referred to," among which were, "that this insurance shall not extend to any bodily injury of which there shall be no external and visible sign upon the body of the insured;" that "this insurance shall not be held to extend to * * * any case of * * * personal injury, unless the claimant under this policy shall establish, by direct and positive proof, that the said * * * personal injury was caused by external violence and accidental means." The policy contains a large number of exceptions of "bodily injuries happening directly or indirectly in consequence of" certain diseases, infirmities, actions, exposures, and employment of the assured, and numerous limitations and conditions; and among others, this: "The insured shall not be entitled to indemnity for disabling injuries beyond the amount of his ordinary wages, salary, or the money value of his time during the period of continuous total disability, not exceeding twenty-six weeks, as aforesaid."

The breach alleged in the complaint in this action upon the policy was, in effect, that June 19, 1884, and while the plaintiff, in the exercise of ordinary care, was about his regular business and employment, and his earnings and time worth \$100 per week, he was accidentally hit with great force upon his instep by a stick of wood thrown by some party, inflicting an outward and external mark, breaking through the flesh, and seriously injuring his foot, by reason of which he "was wholly disabled" and "unable to engage in any business" for the first week thereafter, and was, during that time, "confined to his home and under the doctor's charge;" "that afterwards, by means of great exertion, he was enabled to get to his buggy, and superintend a small part of his business, but was almost wholly disabled for the whole period of twenty-six weeks." The answer alleged, in effect, that the proofs of loss from the accident, furnished by the plaintiff, stated a "total disability therefrom for four days, and no more;" that the defendant tendered to the plaintiff therefor \$15, which he refused to receive, and which the defendant was still ready and willing to pay; and denied all other allegations and liability. The court having refused to nonsuit the plaintiff at the close of his testimony, the defendant proved the tender before the commencement of the action, and paid the money into court. Under the charge of the court, the jury returned a verdict "for the plaintiff in the sum of \$135, for nine weeks at \$15 per week." The court having refused to set aside the verdict and grant a new trial,

judgment was entered upon the same in favor of the plaintiff, from which the defendant brings this appeal.

J. E. WILDISH, *for Respondent*, Saveland.

A. G. WEISSERT, *for Appellant*, Fidelity & Casualty Company.

CASSODAY, J.

The cause was submitted to the jury on the theory that it was the object of the policy to insure the plaintiff against accident, and to pay the plaintiff what the company had agreed to pay for the accident he had received, if by that accident he had been disabled in any way from prosecuting the business in which he was engaged; that it was to indemnify the plaintiff "for his want of capacity to prosecute the business in which he was engaged;" that the plaintiff was "entitled to recover, at the rate agreed on in the policy, for such time as by reason of such accident he" was "rendered wholly unable to do his accustomed labor, that is, to do substantially all kinds of his accustomed labor to some extent." The learned trial judge was supported in such theory by the language of the court in *Sawyer vs. United States Casualty Co.*, 8 Amer. Law Reg. (N. S.), 233. The clause of the policy there involved, was "totally disable him from the prosecution of his usual employment." The case was in the superior court of Worcester, Massachusetts, but never reached the supreme court of that State, nor do we find it referred to in any subsequent case in any court. That case apparently followed *Hooper vs. Accidental D. Ins. Co.* (5 Hurl. & N., 546), where the clause of the policy relied upon was, "any bodily injury to the said insured of so serious a nature as wholly to disable him from following his usual business, occupation, or pursuits;" and it was held, in effect, that a disability which incapacitated the assured from "following his usual occupation, business, or pursuits" was a breach. In neither of those cases was the language of the policy so broad and sweeping as in the case at bar. The language of this policy is even more sweeping than in *Rhodes vs. Railway Pass. Ins. Co.* (5 Lans., 77), where it was held that there could be no recovery because it was not shown that there was a "total disability to labor." In that case the language of the policy was, "accident and injury which totally disabled and prevented from all kinds of business." The same is true with respect to *Lyon vs. Railway Pass. Assur. Co.* (46 Iowa, 631), where the language of the policy was, "while totally disabled and prevented from the transaction of all kinds of business;" and it was

held that such language could not be construed to mean "partially disabled from some kinds of business."

Here the plaintiff was only entitled to recover in case the injury was such as to "wholly disable and prevent him from the prosecution of any and every kind of business pertaining to his occupation," and then only "for such period of continuous total disability," not exceeding the amount stipulated, nor "the money value of his time during the period of continuous total disability, not exceeding twenty-six weeks." The ordinary object of a policy of insurance may be such as stated by the learned trial judge, but the manifest purpose of this policy was to obtain premiums by incurring as little risk as possible. But there was no law to prevent the parties from making their own contract. The plaintiff consented to and made this one. He cannot repudiate or alter its conditions in the day of his calamity. The courts are powerless to make a new contract for him; or to strike some words from the contract he made for himself, and insert others, and thus enlarge the risk, in order to meet the expectation of the plaintiff in obtaining policy. This we should be compelled to do, in order to sanction the charge to the jury. The plaintiff's right to recover is necessarily restricted to the time he was wholly disabled and prevented "from the prosecution of any and every kind of business pertaining to his occupation."

The judgment of the county court is reversed, and the cause is remanded for a new trial.

SUPREME COURT OF ILLINOIS.

NORTHWESTERN BENEVOLENT MUTUAL AID
ASSOCIATION

vs.

MARY J. HALL.*

A finding of facts in a court below sustained by an appellate court is binding on this court.

Where the issue was whether the statements of insured in the application regarding the drinking of liquor were true, questions to the medical examiner whether the application would have been favorably passed on if the answers had been different, were properly objected to.

Appeal from a judgment of the appellate court, third district, affirming a judgment of the circuit court rendered in favor of plaintiff in an action brought by a widow upon a certificate of membership in a mutual aid association.

Messrs. WELDON and SPENCER, for Appellant.

Messrs. TIPTON and BEAVER, for Appellee.

MAGEUDER, J.

This is an action of assumpsit brought by appellee, who is the widow of one Benjamin T. Hall, deceased, against the appellant in the Circuit Court of McLean County, upon a certificate of membership in appellant company bearing date September 27, 1884, for the sum of \$2,000, issued to the said Benjamin T. Hall. The circuit court after a trial of the cause by agreement without a jury, rendered judgment in favor of appellee for \$2,000 and costs. This judgment upon appeal has been affirmed by the appellate court of the third district, and appellant company prosecutes its further appeal to this court.

The certificate in question was in effect a policy of insurance upon the life of the deceased Hall. It certifies that he is entitled to

* Opinion filed, November 6, 1886.

all the rights and privileges of membership in appellant company, and to participate in the beneficiary or relief fund of the association to the amount of \$2,000, "which sum or such part thereof as may be collected, as specified in the constitution and by-laws of the association, shall within sixty days after his death be paid to his wife, Mary J. Hall." It also recites that it is issued upon condition that Hall "shall comply with the constitution and by-laws of the association, and that the statements in the application for this certificate are true." Hall died December 4, 1884, and proofs of death were made by January 2, 1885.

The application referred to, which was signed by Hall, contained, among others, the following questions and answers:—

Ques. Has your general health been uniformly good for the past ten years? Ans. Yes.

Ques. Do you use alcoholic or other stimulants? Ans. No.

Ques. If so, do you drink regularly? Ans. Not at all.

Ques. Do you ever get drunk? Ans. No.

In the application Hall agreed that such "application and declaration" should be the basis of the contract between him and the association," and that if any misrepresentation or fraudulent or untrue answers have been made, or any facts which should have been stated, have been suppressed, if death should result from suicide," etc., then the agreement should be void, and the moneys paid should be forfeited. He also therein declared that he had made full and correct answers to all the questions and warranted such answers to be true and complete statements of all material facts within his knowledge, and agreed that if he should at any time impair his health by immoral practices or the excessive use of alcoholic stimulants or narcotics, the contract should be void.

Upon the issues made in the case the questions presented for the decisions of the trial court were purely questions of fact. They were:—

1st. Was the condition of health of the insured uniformly good for the space of ten years next before his application for membership?

2d. Were the habits of the deceased as to the use of alcoholic liquors such as to amount to a breach of his contract?

3d. Did the deceased commit suicide?

The appellant sought to show that Hall poisoned himself by taking strychnine. There was no positive proof that he had taken such a poison. There was proof tending to show that the pains in his head of which he complained, and the spasms which immediately

preceded his death, may have been caused by some other disease, not the result of strychnia poison. It is not claimed that there was any examination of his stomach by a chemist after his decease, and the expert testimony tends to show that such an examination was the only absolutely certain test of the presence of strychnine.

The questions of fact so presented to the circuit court were decided against appellant. As the appellate court has affirmed the judgment of the circuit court, it must of necessity have found that the evidence sustained the judgment of the trial court. Such finding is conclusive upon us : *Germania Fire Ins. Co. vs. McKee*, 94 Ill., 98.

The appellant did not, as it had a right to do under the forty-second section of the practice act, submit to the trial court "written propositions to be held as law in the decision of the case." Where there is a trial before the court without a jury, in order to present a question of law to this court as having been passed upon by the court below, the party should submit propositions of law to the trial court as provided for in the section referred to : *Tibbetts vs. Libby*, 97 Ill., 552; *Hobbs vs. Ferguson's Estate*, 100 Ill., 232. As this was not done, there is nothing for us to consider except the point hereafter stated.

A physician who was the medical expert of appellant was asked several questions to which objection was made and sustained. They were in substance, whether Hall's application for membership in the association would have been favorably passed upon if it had been stated in such application that he drank liquor.

We think that the objections to these questions were properly sustained. The real issue was whether the statements made in the application were true or false. What would have been the effect if some different statement from that therein contained had been made to the association was of no consequence. The witness might give his opinion on a matter of science connected with his profession, but he could not be allowed to state his views of the manner in which others would probably be influenced if certain specific facts existed. Testimony called for by questions of a similar character has been held to be improper in the following cases : *Washington Life Ins. Co. vs. Haney*, 10 Kan., 525 and 902; *Rawles vs. American Mut. L. Ins. Co.*, 27 N. Y., 282; *Darrell vs. Bederley*, 1 Holt, 283; *Campbell vs. Richards*, 5 Barn and Ad., 840.

The judgment of the appellate court is affirmed.

SUPREME COURT OF IOWA.

Appeal from District Court, Page County.

BOYD

vs.

CEDAR RAPIDS INS CO.*)

A statute provided that within thirty days prior to the maturity of a note given for the premium the company should serve a notice that it was due, or to become due, and unless paid within thirty days "his policy will be suspended. The company may state in said notice the amount which will be due * * and also the amount necessary to pay the customary short rate * * up to the time the policy is suspended, under the notice in order to cancel the risk."

Held, That the word "may" was not merely permissive, but expressive of a step that was necessary to the exercise of the right of suspension. Unless notice of the required amount of short rates was also given, the policy will not be suspended.

Held, That application for an extension of time on the note did not affect the case.

Hld, That refusal to pay a loss on the ground of non-payment of premium is a waiver of proofs.

DEACON & SMITH, *for Appellant*.

STOCKTON & KEENAN, *for Appellee*.

ADAMS, C. J.

The defendant set up as a defense that the plaintiff, at the time of the loss, was in default by reason of the non-payment of his note given for the premium on the policy; and also that the plaintiff had failed to serve upon the defendant proof of the loss, as required by the policy. The two matters of defense will be considered in their order.

* Decision rendered, December 14, 1886.

1. The policy provides that "the company shall not be liable for any loss or damage that may occur to the property herein mentioned while any promissory note given for the premium remains past due and unpaid." The facts relied upon by the defendant appear to be that prior to the loss the plaintiff had given his promissory note for the premium, and that the same was past due and unpaid at the time of the loss. The plaintiff claims, however, that, notwithstanding such fact, the policy was not suspended, because the defendant had not given the notice required by the statute as a condition precedent to the exercise of its rights to declare the policy suspended. The provision of statute upon which the plaintiff relies is to be found in chapter 210 of the acts of eighteenth general assembly, and is in these words: "Within thirty days prior to, or at any time after, the maturity of any note or contract, * * * where the time of payment is fixed in the contract given for the premium on any policy of insurance, such company or association shall serve a notice in writing upon the insured that his note, or any installment thereof, is due, or to become due, * * * and that unless payment is made within thirty days, his policy will be suspended. The company or association may state in said notice the amount which will be due on the note or contract, and also the amount necessary to pay the customary short rates, including the expense of taking the risk, up to the time the policy will be suspended, under the notice, in order to cancel the policy."

The evidence tended to show that the defendant gave the plaintiff notice of the maturing of his note within the time provided by statute, and more than 30 days before the loss, and that the note remained unpaid at the time of the loss. It does not appear, however, that the notice contained any statement of the amount necessary to pay the customary short rate, in order to cancel the policy. But the defendant insists, in the first place, that, under the statute, it was not necessary that the notice should contain such statement; and, in the second place, that if the notice should have contained such statement, it was waived by plaintiff, because he applied for an extension of time on his note, which application was inconsistent with a desire to pay the short rate, and let his policy be canceled.

As to the necessity of such statement in the notice, it is to be observed that the statute provides that the company may state in the notice the amount necessary to pay the customary short rates, etc. The defendant insists that the provision is merely permissive, and not obligatory, as shown by the use of the word "may." But,

in our opinion, this position is not sound. The object of the provision is to give the defendant a right to declare the policy suspended. Nothing is in fact obligatory; not even the giving of notice of the maturing of the notes, unless the company desires to declare the policy suspended. Viewing the matter in this light, we see nothing inconsistent in the legislature's providing what the company may do as a condition precedent to the exercise of such right. If it does nothing, the policy simply remains in force, and the note given for premium remains in force. The company may prefer this, rather than take any step with a view to suspension, because the insured, if he should not be able to pay his premium note, and should see that his policy is about to be suspended, might prefer to demand cancellation, and escape by payment of the short rate. But where the company prefers to take steps with a view to suspension, it is proper that the insurer should be informed as to what the short rate would be, that he may know what his rights are, and what his interest required him to do under the circumstances.

It is insisted by the defendant that the difficulty of determining, with accuracy, what the amount would be which it would be necessary for the insured to pay, in order to cancel is so great that it would be a hardship on the company to require it to state the exact amount in the notice, in order to give it a right to declare a suspension. It is not to be denied that whatever amount might be stated, the insured would have a right to contest the amount, if he desired to cancel, and perhaps, if the amount which should be stated in a notice should be too large, such statement would not be deemed a proper compliance with the statute. But the statute certainly contemplates that it can be stated, and we do not think that the company's right to declare a suspension so very important to it that we should be justified in giving much weight to the defendant's argument based upon this ground.

Having reached the conclusion that the defendant should have embraced in its notice to the plaintiff a statement of the amount of the short rate, etc., we come to consider whether the plaintiff is in a position to take advantage of this defect after having applied for an extension. On this point we have to say that we are unable to see that the application indicates anything except that the insured felt unable to pay at that time, and wished to continue, if he could be indulged with an extension. He was not in fact indulged, and the circumstances were apparently such as to render it peculiarly proper that he should be promptly informed of the conditions upon which

he might have cancellation. In our opinion, then, the fact that the plaintiff applied for extension is not one which can aid the defendant.

2. We come next to consider the alleged want of proof of loss. It may be conceded that there was a want of such proof. But the plaintiff claims that the defendant waived proof of loss by its unqualified refusal to pay, based upon facts within its own knowledge. He relied upon *Keenan vs. Missouri State Ins. Co.*, 12 Iowa, 137, and *Carson vs. German Ins.*, 62 Iowa, 433. The rule as contended for is not denied by the defendant, but its position is that it has no application to this case, because the plaintiff's obligation to serve proofs did not rest alone upon the contract between the parties, as in the cases relied upon, but upon the statute. In our opinion, however, the defendant's position cannot be sustained. Proofs of loss, where made, are solely for the benefit of the company. We think that the company might waive what is solely for its benefit, whether the same is provided for by contract or statute. Would there be any doubt about this if there had been an express agreement of waiver? But an unqualified refusal to pay, based upon facts within the company's knowledge, and made under such circumstances as to justify the insured in believing that the rendition of proofs would be a vain act, and that they would not be examined, has, we believe, always been considered equivalent to an express agreement of waiver.

We see no error, and the judgment must be affirmed.

SUPREME COURT OF MICHIGAN.

Error to Iosco.

NURNEY

vs.

FIREMAN'S FUND INS. CO.* }

A policy provision that no action shall be maintained until the matter in dispute has been submitted to arbitration at the request of either party, where no request for arbitration had been made, will not bar a suit. Such suit is a revocation of the agreement as to arbitration which was revocable at common law.

HENRY & CORNVILLE and ATKINSON & VANCE, *for Plaintiff and Appellant.*
HANCHETT & STARK, *for Defendant.*

SHERWOOD, J.

This action was brought to recover the amount of a loss by fire sustained by the plaintiff, under a policy of insurance issued to him by the defendant, upon a drug store, and the stock of drugs therein, situate in the village of Oscoda, in the county of Iosco. The policy was made on the twenty-fifth day of July, 1884, and to continue in force one year thereafter. The fire which destroyed the property occurred on the twenty-seventh day of October, 1884, and the next day an appraisal was made, which showed the loss to be about \$3,000, while the insurance upon the stock and store amounted to but \$1,200. The plaintiff's books, invoices, and papers were lost by the fire. The defendants were properly notified of the loss, and the defendants' agent came to Oscoda several times to adjust the loss, but failed, for the reason, as the company claims, that the plaintiff did

* Decision rendered, November 17, 1886.

not furnish their agent with the proper invoices and other papers from which he could correctly ascertain the loss. Plaintiff claimed, however, his invoices and papers being lost in the fire, he furnished the company with the best proofs of loss he could under the circumstances, and after repeated negotiations the parties failed to come to any adjustment of the case, and the plaintiff brought this suit to recover for the loss, to the amount of his policy, on the twenty-fourth day of April, 1885.

This clause appears in the body of the policy, viz.: "This policy is made and accepted in reference to the foregoing and following terms and conditions, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligation of the parties thereto." The policy further provides that in case differences shall arise concerning the amount of any loss or damage by fire, after proof thereof has been received in due form by the company, the matter shall, at the written request of either party, be submitted to the judgment of two competent persons, to be mutually appointed by the assured and the company, who, in case of disagreement, shall choose a third, whose award in writing, signed by any two of them under oath, and submitted in detail, shall be binding on the parties as to the amount of such loss and damage, but shall not decide the liability of the company. It further provides as follows: "It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided."

Upon the trial the plaintiff gave evidence tending to show his loss by fire of the insured property, and of the value of the property destroyed; of giving notice and proof of loss to the defendant, and of the disagreement of the parties as to the amount of the loss. It further appeared without dispute, that no request was made by either party for an arbitration to determine the amount of the loss. In submitting the cause to the jury, the court instructed them that the plaintiff could not maintain his suit until the amount of his loss had first been determined by arbitration, or he had given notice to the defendant of his desire to have the same so determined, and that the defendant had neglected or refused to comply with the request; and thereupon further instructed the jury to return their verdict for the defendant. To this instruction the plaintiff excepted.

and this exception raises the only question in the case for our consideration.

I think the exception well taken, and the court erred in giving the instruction. It was held by this court in *Callinan vs. Port Huron & N. W. Ry. Co.* (27 N. W. Rep., 718), that an agreement to arbitrate will not bar an action based upon the same grievance. See also *McGunn vs. Hanlin*, 29 Mich., 480; *Oakwood Retreat Ass'n vs. Rathbone*, 26 N. W. Rep., 742; *Morse, Arb.*, 77. The agreement that "no suit shall be brought on this policy until arbitration had and award made," must be read in connection with the clause of the policy providing for the submission and arbitration, in giving it the proper construction.

It will be noticed, by a careful perusal of these provisions of the policy, that in case of a difference between the company and the assured as to the amount of a loss, arbitration and award are only contemplated or provided for when a written request is made by one of the parties therefor. In this case a difference as to the amount of the loss had existed more than five months after the fire occurred, and neither party claimed the right, and expressed in writing a desire to have the difference settled by arbitration, and never have expressed such desire as provided by the policy, up to the present time. Arbitration becomes imperative only after the written request for one has been made. The request, as it stands in this policy, is optional with either party, and, neither of them having availed themselves of the right to arbitrate, it must be deemed waived by both, and in such case the plaintiff was left to the mode of redress provided by the law: *Gere vs. Council Bluffs Ins. Co.*, 23 N. W. Rep., 137; *Scott vs. Phoenix Ins. Co.*, 1 Stu. K. B., 152.

In this case the agreement to arbitrate never became operative, and the agreement not to sue, being dependent on the agreement to arbitrate, of course must have become inoperative: *Phoenix Ins. Co. vs. Badger*, 53 Wis., 283; s. c., 10 N. W. Rep., 504. The following authorities I think support, in the main, the positions herein taken: *Gibbs vs. Connecticut Ins. Co.*, 20 N. Y. Sup. Ct., 611; *Mark vs. National Fire Ins. Co.*, 24 Hun, 565; see s. c., 91 N. Y., 663; *Wallace vs. German-American Ins. Co.*, 1 McCrary, 335; s. c., 2 Fed. Rep., 658; 2 Wood, *Fire Ins.*, 115, 116; *Schollenberger vs. Phoenix Ins. Co.*, 7 Ins. Law J., 697; *Mentz vs. Armenia Fire Ins. Co.*, 79 Pa. St. 478; *Reed vs. Washington Ins. Co.*, 138 Mass., 572; *Stephenson vs. Piscataqua Ins. Co.*, 54 Me., 55; *Cobb vs. New England M. M. Ins. Co.*, 6 Gray, 192; *Trott vs. City Ins. Co.*, 1 Cliff., 439; *Lasher vs.*

Northwestern Nat. Ins. Co., 18 Hun, 98; Hurst vs. Litchfield, 39 N. Y., 877; 2 Wood, Ins., 1,016; 2 Dig. Fire Ins. Dec. 40, 41; Leach vs. Neptune Fire Ins. Co., 58 N. H., 245.

The arbitration provided for in the policy was a common-law one. It was revocable at the pleasure of either party. Such revocation would not invalidate the policy; neither do I think it was ever intended by the parties that a revocation should carry with it a forfeiture of the contract, or the right of the assured to maintain an action upon it in case of loss. Bringing the action was a revocation of the agreement to arbitrate. Before a forfeiture can occur there must be no question but the parties intended to provide for it in the contract under which it is attempted to enforce it. I can hardly conceive that under a contract revocable at the pleasure of either party, without condition expressed, a penalty of forfeiture can be enforced against either making the revocation.

The failure of the parties in this case to arbitrate the matter in difference was the fault of the defendant, if it was desired, and it cannot now be urged as a defense to the plaintiff's action.

The judgment must be reversed, with costs, and new trial granted. The other justices concurred.

SUPREME COURT OF INDIANA.

Appealed from the Marion County Superior Court.

ELIZABETH McLEAN

vs.

JAMES W. HESS ET AL.*

Where property is conveyed by A to B for purpose of defrauding creditors, and no part of the purchase money has been paid, B has an insurable interest in the property and is entitled to the insurance money on a policy taken in her name, and it cannot be taken from her by creditors.

ZOLLARS, J.

The evidence tends to establish the following facts: In 1881, one George W. Gibson was the owner of a mill property in Boone County. After some negotiation he agreed to sell it to Thomas S. McLean, the husband of appellant, for the sum and price of \$1,600. The last negotiations were between Gibson and appellant and her husband. It was then determined by all of the parties that the deed should be made to appellant. The object on the part of appellant and her husband was to put the property beyond the reach of Mr. Daggy, to whom the husband was indebted.

Gibson's object was the same, as he feared that if the husband should take the title, Mr. Daggy would take the property, and he, Gibson, would thus lose the amount for which he was selling the property, as at the time the husband, Thomas S. McLean, was insolvent, and had no property out of which anything could be made by execution.

* Opinion filed, May 25, 1886.

The deed for the property was made to appellant. Nothing was paid to Gibson at the time, and nothing has at any time been paid by appellant's husband unless the facts hereinafter stated show payment by him.

Appellant and husband executed a note to Gibson for \$1,600, as it was agreed they should do. They also agreed to give him a mortgage upon the property to secure its payment, but after appellant got the deed she refused to execute the mortgage.

Appellant and husband also agreed to have the property insured for Gibson's benefit. He furnished them money with which to pay for the insurance. A policy of insurance was procured, but in favor of and payable to appellant.

Gibson had agreed with appellant's husband to furnish him money with which to operate the mill. The mill was for a time operated by the husband and his and appellant's son, in the name of McLean & Son. During this time Gibson furnished money to the husband which was used in buying wheat, etc.

The mill burned in 1883. At that time no part of the purchase price had been paid to Gibson. He sought to have the insurance policy assigned to him. Appellant declined to assign it, and collected thereon the sum of \$1,770 from the insurance company. When the mill burned the boiler and engine and some other machinery of the value of \$600 were saved. These appellant and her husband offered to Gibson in payment of his note. It was finally agreed that they should be shipped to Indianapolis in the name of Gibson and sold. The husband, however, shipped them in his own name. Finally, in settlement of Gibson's note, appellant gave him \$950 of the insurance money, and her son conveyed to him a house and lot. While the boiler, engine, etc., were at Indianapolis, and before appellant's husband had consummated a sale of them, Mr. Daggy commenced a suit in attachment against him, and they were taken by the sheriff, Hess, upon a writ of attachment as the property of the husband, Thomas S. McLean. Appellant replevied the property from the sheriff. To that action Mr. Daggy became a party, and made the defense that the mill property, of which the machinery in question was a part, was purchased and paid for by Thomas S. McLean, the husband, and that without any consideration, and for the purpose of defrauding his creditors, especially Mr. Daggy, he caused the property to be conveyed to appellant, she participating in the fraud.

It is provided by sections 2,974, 2,975, R. S., 1881, that where a conveyance is made to one person, and the consideration therefor paid by another, the same shall be presumed fraudulently against the creditors of the person paying the consideration.

The undisputed testimony is, Thomas S. McLean has paid no part of the purchase money to Gibson. Gibson furnished "to them" the money with which to procure the insurance, and "they used the money, not having it (the property) insured" in his name.

The insurance was taken in appellant's name. However fraudulent the purpose may have been in having the property conveyed to her, that policy belonged to her. However fraudulent the conveyance to appellant may have been, she had an insurable interest in the property. The insurance was taken in her name; the policy was hers and the proceeds thereof cannot be taken from her by the husband's creditors: *Pence vs. Makepeace*, 65 Ind., 345; *LeRou vs. Wilmarth*, 9 Allen, 382; *Nipp's App.*, 75 Pa. St., 472; *Bernhein vs. Beer*, 56 Miss., 149.

It is clear, therefore, that the \$950 of the insurance money paid upon the purchase-money note was paid by appellant, and not by her husband. The house and lot conveyed to Gibson was the property of her son, and not of the husband. Thus it appears that no part of the consideration for the conveyance of the mill property was paid by appellant's husband.

This being so, it is difficult to see how Mr. Daggy or any other creditor of the husband could or could not be injured by the conveyance to appellant, or by any fraudulent purpose therein.

There are sometimes injuries without remedy, but in a case like this the law will not afford a remedy where there is no injury. No property or money of the husband went into the property purchased from Gibson. It is not shown that it was in any way increased in value by any skill or labor of the husband.

It is a settled law, we think, that a conveyance will not be set aside, nor the property conveyed be subject to the payment of the debts of the fraudulent debtor, where it appears, as it does appear here, that none of his property or money has gone into the property so conveyed: *Leonard vs. Barrett*, 70 Ind., 367; *Sherwood vs. Hoagland*, 54 Ind., 578. It is not a question of conflict in the evidence to make a case against appellant such as the law requires in order to take the property and apply it to the payment of the husband's debts.

Judgment reversed and remanded.

COURT OF APPEALS OF KENTUCKY.

Appeal from Louisville Law and Equity Court.

LEE AND OTHERS.

vs.

PAGE AND OTHERS.*

A father induced his children to release their interest in a policy of insurance which they were entitled to as heirs of their mother. *Held*, they could not afterwards set up the want of consideration for the release, as against a third party, a creditor of the father, to whom the policy had been assigned; but one of the children being a married woman at the time of executing the release, it was void as to her.

Where a wife owned a policy of insurance, and the husband, after her death, joined in assigning the policy as her administrator, saying nothing about his interest as her distributee, *held*, he passed his entire interest under 1 Acts 1869-79, p. 61, providing that a policy owned by a married woman inures to her separate use, independently of her husband.

E. E. McKAY, for Appellants, Lee and Others.

HOLT, J.

Thomas S. Gorin, on May 19, 1869, took out an insurance in the Mutual Benefit Life Insurance Company for \$10,000 upon his life, payable at death to his personal representative or assignee. He assigned it on December 7, 1869, to his wife, Mary A. Gorin, and his daughter Florence, now Mrs. Lee; the insurance company consenting to it in writing. His wife died on September 5, 1870, while he did not die until January 11, 1883. She made no effort to dispose of her interest in the policy. They left four children. At the instance of the father, all of them in January, 1876, surrendered and

* Decision rendered, January 13, 1887.—From *Southwestern Reporter*.

released, in writing and for value received, as therein recited, all claim upon their part by reason of the above assignment. Two of them were then married women, and their husbands did not unite in the release. The father, who had qualified as the administrator of his wife, also in his representative character, released all claim by virtue of it. This, however, amounted to nothing, as the act of the legislature relating to insurance companies provides that, if a policy of insurance be expressed to be for the benefit of a married woman, or be assigned or made payable to her, it shall inure to her separate use and benefit, and that of her children, independently of her husband or his creditors: 1 Acts 1869-70, p. 61. When Mrs. Gorin died, her interest in the policy inured to her children under the statute, which was construed in the case of *Robinson vs. Duvall*, 79 Ky., 83.

Thomas J. Gorin, on December 18, 1879, assigned the policy as indemnity to Page & Co., who were his creditors, and they, on December 14, 1880, made an assignment of their estate for the benefit of their creditors. They and their assignee, respectively, paid the premiums from the time the policy was assigned to them until the assured. The insurance company filed this suit in the nature of a bill of interpleader, to settle the rights of the claimants to the fund, which amounts, after deducting the indebtedness of the insured to the company, to \$7,804.69. The son, James E. Gorin, asserts no claim to any part of it. One daughter, Emma G. Murrell, who, without her husband uniting, signed the release, files an answer, in which her husband joins, disclaiming any interest in the fund, and recognizing the claim of the assignee of Page & Co. to it. This narrows the controversy to the assignee upon the one hand, and Mrs. Lee and her sister, Mrs. Ashby, upon the other.

It is urged that the releases were without consideration, and therefore void. It appears that the father had received money advances from Page & Co. to aid him in his business, and had thus become indebted to them in largely more than the amount of the policy of insurance. He had no means with which to pay this debt. He had made a transfer of some property, which was incumbered by mortgage, to Ashby, and Page & Co. appear to have been discussing whether they would sue and attach the transfer. There is some evidence tending to show that the policy was assigned to them as indemnity in consideration of a promise not to do so. Upon the other hand, some of the Gorin children testify that the father represented to them that, if they would sign the release, it would aid

him in his business, or give him credit with Page & Co., and enable James E. Gorin to retain his place as a partner in the firm of Page & Co., and that, upon this statement, they signed it, nothing being said about any suit; but that it neither so aided the brother or the father. The testimony is somewhat conflicting whether any suit was brought upon the indebtedness of Thomas J. Gorin to Page & Co.; but, if so, it was subsequent to the assignment. All this, however, is, to our mind, immaterial, because it does not lie in the mouths of the parties executing the release to say, as against Page & Co., that there was no consideration therefor. They executed it for and at the instance of the father; it recited that it was for value; and it is now held by a third party, as against whom they cannot now say that their release was without consideration. The policy was acquired by Page & Co. as assignees in a valid way, and after the children had joined in a release, as it recites for value.

The policy was payable to the personal representative or assign of Thomas J. Gorin; he assigned to his wife and daughter; the wife died; thereafter the children released all interest in it, the effect of which was to place the matter as if no assignment had ever been made by the father; and he thereupon transferred it to a third party, who received it in good faith, and to secure an existing, bona fide indebtedness. The parties executing the release, in the absence of disability upon their part to do so, cannot now complain.

Mary E. Ashby, however, was a married woman when she signed it. Her husband did not unite in it. She is not, therefore bound by it, nor can it affect his rights. It was a void act as to them; and the court below erred in not adjudging to her one-eighth of the fund.

Judgment reversed, with directions to render a judgment, and for further proceedings in conformity to this opinion.

Lewis, J., not sitting.

SUPREME COURT OF PENNSYLVANIA.

Error to the Court of Common Pleas of Warren County.

WHITE

vs.

WESTERN ASS'E CO.*

A policy of fire insurance contained a condition that it would become void if in the premises there should be kept petroleum without written permission. From the time of making the policy until the fire the plaintiff kept a barrel of petroleum in a shed outside of, but adjoining the building destroyed, within five or six feet of the boiler, using the same as fuel for generating steam. There was no proof that the fire arose from the storage of the petroleum.

Held, That it was in habitual use, and was not an article of such vital necessity in the plaintiff's business that it could be ignored as a matter not subject to the conditions of the policy, he could not recover.

This was an action in covenant on a policy of insurance by William White, plaintiff in error and below, against the Western Assurance Company of Toronto, Canada, defendant in error and below.

The facts of the case are fully set forth in the opinion of the supreme court. The court below charged the jury, *inter alia*: "Taking the stipulations contained in this policy, we cannot regard it as anything other than an agreement on the part of the plaintiff that if in said premises there be kept petroleum, then this policy shall be void; and we cannot under the evidence come to any other conclusion than that the plaintiff did keep petroleum in the premises; although we are reluctant to take this view of it, we deem it our duty to say to you that the plaintiff is not entitled to a verdict."

*Decision rendered, Oct. 4, 1886—From *Legal Intelligencer*.

A verdict having been entered for defendant, the plaintiff took this writ of error, assigning for error that portion of the charge above quoted, and the direction to find for defendant.

Messrs. WILBUR & SCHNUR, for Plaintiff in Error.

R. BROWN, Esq., for Defendant in Error.

GORDON, J.

This was an action of covenant on a policy of insurance, dated April 12, 1883, by which the defendant undertook to insure against loss by fire the machinery, tools, patterns, etc., belonging to the plaintiff, in and about an iron foundry, which was under a lease from one James Lighty. The assured property, together with the foundry, was destroyed by fire on the 12th of May, just one month after the date of the policy. The defense was, that this policy became, and was made, null and void in consequence of a breach by the assured of the following condition: "If in said premises there be kept gunpowder, fireworks, nitro-glycerine, phosphorus, saltpeter, nitrate of soda, petroleum," etc., then and in every such case this policy shall become void. The admitted facts are that petroleum was used as fuel for the engine, by which the machinery of the foundry was driven, which fuel was drawn from a tank or barrel kept in a shed united with, and so made to form part of the main building, and, as one of the witnesses says, some five or six feet from the furnace. The oil was conducted from the barrel by a half-inch pipe to the place of consumption, an iron pan in or under the boiler, and as this fuel was drawn from the barrel, a fresh supply was furnished as necessity required. We may here observe, obiter, that whilst there are devices by which petroleum can be, and is, used as a fuel for raising steam with perfect safety, that above described is certainly not one of them. Nevertheless, it is not for us to determine whether a fuel of this kind, and so used, was more or less dangerous than wood or coal. The only question for us is, whether the keeping of a barrel of petroleum in the insured premises was such a breach of the condition in the policy as released the company from its obligation? We are always unwilling to enforce a forfeiture when such result can be avoided. Nevertheless, when the intention of the parties is plainly expressed, that intention must be regarded as the law of the contract, and we cannot lawfully ignore it, even to prevent a forfeiture. But, as to the parties before us, the unequivocal agreement, as found in the policy, is, that the keeping of petroleum in the premises insured shall render that policy null and void. That petroleum

was so kept is not denied, and this, not as in the case of *Mears vs. The Humbolt Insurance Co.* (11 Norris, 15), temporarily and for casual use, but habitually and for constant use; nor was it, as in the *Citizens' Insurance Company vs. McLaughlin* (3 P. F. S., 485), an article of such vital necessity in the conduct of the business of the insured that its use could not be ignored, and therefore must have been recognized as a matter not subject to the condition. Petroleum, however convenient and economical, was certainly not a fuel without which the foundry could have been run, since its place could well have been supplied by wood or coal. What shall we say then? that the contract of the parties shall not stand? But on what ground can we justify a conclusion such as this? The parties were *sui juris*; no fraud is alleged, nor is the condition even unreasonable; the company was not willing to insure against so dangerous a commodity as petroleum, and therefore expressly forbade not only its use, but even its presence on the property, and under and subject to this condition the plaintiff accepted the policy. Under such circumstances, were we to reverse the court below, we must not only disregard the contract of the parties, but also overrule our own cases of the *Birmingham Fire Insurance Co. vs. Kroegher* (2 Nor., 64), and the *Lancaster Fire Ins. Co. vs. Leinheim* (8 Nor., 497), which in principle rule the case in hand. The judgment is affirmed.

SUPREME COURT OF IOWA.

BROWN

vs.

AMERICAN CENTRAL INS. CO.*

The agent informed the applicant that he had no authority to insure the property in question, which was of a peculiar kind, but executed a policy which was placed in the hands of a third party to hold until he could learn whether the company would accept the risk. The latter declined it, when the agent reclaimed the policy. The premium had been paid with the understanding that it should be returned if the risk was not accepted.

Held, That there was no contract.

CASWELL & MEEKER, *for Appellant*.

BROWN & CARNEY and O. L. BINFORD, *for Appellee*.

ROTHROCK, J.

The plaintiff was the owner of what he called an "Automatic Show," and in connection therewith he had some stuffed snakes and some live snakes in cages, two bass-drums, a snare-drum, and an organette. The automatic show was a contrivance made upon a frame of pine wood, in which there were belts, which run over pulleys, and upon the belts were little blocks of wood or images which would pass in review by turning a crank. There was a muslin screen in front to keep the machinery from view, and persons admitted to the show looked through a small aperture at the sights thus exhibited. A red light was thrown upon the moving scene, and at a certain point in the exhibition the machinery would touch a trigger, and fire off a little toy cannon, and beat a drum. This whole outfit was stored in a large room in a wooden building across an

* Decision rendered, December 17, 1886.

alley from a blacksmith shop, in the city of Marshalltown, on the tenth day of April, 1884, and the plaintiff and his wife were living in the same room. The show was in winter quarters, or not on exhibition, because the snakes were shedding their skins. The record shows that it was in this state of "masterly inactivity" for one or other of the above reasons.

On said tenth day of April the plaintiff made application to J. B. Statler, an agent of the defendant, for a policy of insurance against loss by fire upon the above-described property. He was advised by Statler that he had no authority to insure snakes, and he doubted whether any company he represented would insure the other property. But, upon thinking the matter over, he filled up and signed a policy in the defendant company, covering all the property but the snakes. The amount of insurance named in the policy was \$1,000. Statler and the plaintiff went to the blacksmith shop across the alley from the building in which the property was stored, and left the policy with the blacksmiths, to remain in their custody until Statler could communicate with the defendant company, and ascertain whether the risk would be accepted. This was on Saturday. On the following Monday morning, at about 5 o'clock, a fire broke out in the room in which the property was stored, and some of the cages were burned up, and the automatic arrangement was scorched to some extent. The defendant refused to accept the risk, and Statler went to the blacksmith shop and obtained possession of the policy on the same day of the fire. The place of business of the defendant company is in St. Louis, Missouri. The jury awarded the plaintiff damages in the sum of \$100.

One ground urged for a reversal of the judgment is that the evidence does not show that the policy was at any time delivered to the plaintiff. There are many other errors assigned and urged, but we do not think it necessary to consider them. We think that the verdict should have been promptly set aside because there was no evidence to support it. The theory of counsel for appellee is that, when the policy was placed in the custody of the blacksmiths, it became binding on the defendant until such time as it should cancel it. But the evidence shows conclusively that it was deposited to remain until it should be ascertained whether the company would accept the risk. The plaintiff wanted his property insured for one month, and it is true he paid Statler the premium for that time, but this was paid with an understanding that, if the company did not accept the

risk, Statler was to take the policy back, and endeavor to effect insurance in another company.

Much consideration appears to have been given at the trial to certain evidence to the effect that the blacksmith refused to deliver the policy to Statler until he promised to deliver it to Brown. This is denied by Statler, and it is wholly immaterial whether he made the promise or not. A delivery of the policy to the plaintiff by Statler would have availed the plaintiff nothing, because the company had refused to accept the risk. No court or jury would be warranted in finding that there was any delivery of this policy to the plaintiff, nor to any other person for him. He claims that he had it in his hands. This is wholly immaterial, unless it was put into his hands as a binding contract upon the defendant.

We confess that we do not have the patience to set out the evidence upon which the verdict is founded. It is enough to say that it utterly fails to show that any binding contract of insurance was made. Reversed.

SUPREME COURT OF IOWA.

—
Appeal from Humboldt Circuit Court.
—

HUNT

vs.

FARMERS' INS. CO.* }

Section 2,584 of the Iowa code confers jurisdiction upon a justice of the peace of an action brought on a policy of insurance insuring property within his county, where the loss occurs, although the principal office or place of business of the insurance company is in another county.

Action upon a policy of insurance, commenced before a justice of the peace. The suit was dismissed because it was not brought in the county where the defendant actually resided. The judgment of the justice was affirmed by the circuit court, and the plaintiff appeals.

J. C. RAYMOND, *for Appellant*, W. A. Hunt.

PROUTY & TAFT, *for Appellee*, Farmers' Ins. Co.

SEEVERS, J.

We are required to determine the following question: "Does section 2,584 of the code confer jurisdiction upon a justice of the peace in an action brought on a policy of insurance insuring property within his county, and where the loss occurred, when the principal office or place of business of the company is in another county than where the justice resides?"

Section 2,584 of the code is in these words: "Insurance companies may be sued in any county in which is kept their principal

* Opinion filed, October 7, 1886.

place of business, in which was made the contract of insurance, or in which the loss insured against occurred." That this section is broad enough to include actions before a justice of the peace we think must be conceded, unless there is some other statute which forbids that such a construction should be adopted. The powers and jurisdictions of justices of the peace are defined in title 21 of the code, and it is therein provided that justices of the peace do not have jurisdiction over actual residents of some other county except as provided in said chapter: Code, § 3,507.

Section 2,584 forms a part of title 17 of the code, but it originally was a part of chapter 95 of the acts of the fourteenth general assembly. The title of chapter 95 is "An act providing the place of bringing suits in certain cases," and consists of five sections, three of which are now sections 2,582, 2,583, and 2,584 of the code. It cannot be doubted that these sections embraced actions before a justice of the peace, for the language employed clearly includes all courts and all suits in whatever court brought. This being so, the mere fact that the codifiers placed the statute enacted in 1872 in title 17 of the code, and such codification was adopted by the general assembly, should not have the effect to limit the scope and meaning of the statute. If the section be now read and construed by itself, it clearly embraces suits before justices of the peace; and as it was enacted since section 3,507 of the code, and then was again re-enacted when the code was adopted, and while each title of the code was separately enacted, still the whole code should, for the purpose of construction, be regarded as having been enacted at the same time, and therefore sections 2,584 and 3,507 must be read and construed together, and such construction must be adopted, if consistent with the language used, as will give force and effect to both sections. This being done, it is clear that section 2,584 cannot have full force and effect unless justices of the peace have jurisdiction of actions against insurance companies in the cases contemplated in the statute. Therefore section 3,507 should be limited to natural persons who are actual residents of some other county than that in which the justice resides.

We are of the opinion that the foregoing questions must be answered in the affirmative. Reversed.

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No. 4

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF CONNECTICUT.

NEW LONDON COUNTY.

OCTOBER TERM, 1886.

FRANK L. PALMER AND OTHERS

vs.

HARTFORD FIRE INS. CO. .

Upon the termination of the policy the parties agreed for a renewal of the contract upon the terms and conditions of the expiring policy. The new policy contained the co-insurance clause, which was not in the first policy but its presence was not discovered by the insured until after the loss. In a suit for reformation of the contract :

Held, That the insured was not guilty of such laches in failing to read the policy until after the loss as would debar him from the right to a reformation of the contract.

Held, That the variation from the original policy could only be attributed to fraud or mistake, and the insured was entitled to have the renewal policy reformed to correspond with the original.

VOL. XVI.—18.

S. LUCAS, *for Plaintiffs.*

H. C. ROBINSON and C. E. PERKENS, *for Defendants.*

PARDEE, J.

The complaint in effect is as follows, viz.: prior to May 15th, 1884, the defendant had issued to the plaintiffs a policy of insurance against loss by fire upon merchandise; on that day it expired; on that day the defendant proposed to them to renew the insurance upon the terms and conditions of the expiring policy; the plaintiffs accepted the proposition; the defendant wrote a policy, delivered it to, and received the premium from the plaintiffs; they, relying upon the fidelity of the defendant to its promise, and supposing the last written policy to contain the same stipulations and conditions as were in the first, omitted to read it.

The merchandise was damaged by fire on August 17th, 1884; subsequently the plaintiffs for the first time discovered that the last policy contained this condition, which was not in the first, viz.: "Co-insurance clause. If the value of the property at the time of any fire shall be greater than the amount of the insurance thereon, the insurer shall be considered as co-insurer for such excess, and all losses shall be adjusted accordingly." In this respect the last policy materially differs from the first. The plaintiffs would not have accepted the policy and paid the premium if they had known that it contained this clause; and if the defendant had notified them of its refusal to perform its agreement they could and would have obtained elsewhere at the same price the desired insurance upon the stipulated terms.

The defendant refuses, either to correct the policy or perform the agreement. The plaintiffs ask that the policy may be reformed so as to express the agreement, and that the defendant be compelled to perform the agreement and pay the indemnity promised by it.

The defendant answers by demurrer, for these reasons, viz.: Upon the facts stated the plaintiffs are not entitled to the relief sought. The complaint does not aver that there was a mutual mistake between the parties as to the terms of the policy or as to the agreement for one. The plaintiffs were guilty of gross laches in not reading the policy; in not notifying the defendant of their claim so that it might have exercised its right of rescission before loss. The superior court held the complaint to be insufficient. The plaintiffs appeal for the following reasons, viz.:—

1. The court erred and mistook the law in rendering judgment in favor of the defendant to recover costs.

2. The court erred and mistook the law in not holding that the plaintiffs were entitled to recover at least the amount of loss covered by the policy or delivered to the plaintiffs by the defendant.

3. The court erred and mistook the law in holding, that upon the acts stated in the complaint, the plaintiffs were not entitled to the relief sought.

4. The court erred and mistook the law in holding that the plaintiffs should have averred in their complaint that there was a mutual mistake between the plaintiffs and defendants as to the terms of said policy of insurance delivered to the plaintiffs.

5. The court erred and mistook the law in holding that there was no allegation in the plaintiffs' complaint of an agreement between the parties as to the specific terms of the new policy that was to be issued.

6. The court erred and mistook the law in not holding that as the defendant had agreed to renew said insurance on the same terms and conditions as stated in the old policy of insurance for one year, for the same premium, and issue a policy therefor, that it was immaterial under the circumstances in this case whether the failure to perform said agreement on the part of the defendant was by mistake or design.

7. The court erred and mistook the law in holding that the plaintiffs were guilty of such gross laches in not examining the new policy, that they are not entitled to relief, and in holding that the defendants were excused in the performance of their contract, because the plaintiffs did not detect their omission to deliver such a policy to the plaintiffs as it agreed to, until after the fire.

8. The court erred and mistook the law in holding that it was the duty of the plaintiffs to detect and notify the defendant of an alteration which the defendant made, and in the very nature of the case must have had knowledge of, to wit.: the changes in the terms and conditions of the new policy from those in the old.

9. The court erred and mistook the law in not holding that the plaintiffs were entitled to a correction of said last-named policy in the manner sought, and to specific performance of the agreement stated in paragraph 10, and to judgment for the amount that would be done by said policy, when corrected, by reason of said loss by said fire.

For the purpose of testing the sufficiency of the pleadings, we are to assume that the defendant admits that an agreement between it .

and the plaintiffs for indemnity against loss by fire, containing every stipulation and condition which should enter into or affect it was reduced to writing, and that the defendant agreed to make and sign a copy thereof, except as to the dates of commencement and termination of risk, and deliver the same to the plaintiffs; that it wrote and signed a policy of insurance, delivered it to the plaintiffs as and for a performance of its promise, and received the stipulated premium without notice to them that an important and variant condition had been added to those contained in the first written agreement; that the plaintiffs, trusting to the defendant's fidelity to its undertaking, omitted to examine the policy for the purpose of discovering variances from the written draft, and did not in fact discover the variance until after damage to the property for which indemnity had been sought.

The presence of the variant clause in the delivered instrument is of necessity due either to intention or mistake upon the part of the defendant. To attribute it to the former is to charge constructive fraud at least, and inasmuch as the plaintiffs have not charged this specifically, if we accede to the rule of law invoked by the defendant, that unless fraud is so charged it is excluded from the case, there remains the other and only possibility, viz., mistake; and upon a fair interpretation of the allegation this, the only possible legal meaning is to be attributed to it, viz.: that the writing, which by the agreement of the parties, should have been a copy of a previously written draft, did in fact contain a variant and material clause which neither of them desired or intended it should contain; which neither party would knowingly have permitted to be in it. This meaning the defendant should have found therein, and to it made answer.

That it is a most frequent and useful office of a court of equity to reform written contracts and make them conform to the verbal agreement or written draft which of necessity precedes them, is in the knowledge of all, and it is sufficiently accurate to say that no writing is beyond its reach, if the prayer for relief is presented in due season and supported by convincing evidence.

Of course the presumption in favor of the written over the spoken agreement is almost resistless; and the court has wearied itself in declaring that such prayers must be supported by overwhelming evidence or be denied. But in the case at bar the defendant volunteers to lift this burden from the plaintiffs, and upon the pleadings admits that the delivered policy is materially variant from the precedent written draft agreed upon.

re many precedents for the reformation of policies of cases where the insured has held the policy until after death and in ignorance of the necessity for such reformation because of the omission to read the policy or of a mistake. A few are cited.

Essex Ins. Co. (3 Mason, 10) Story, J., said: "There is no present day be any serious doubt that a court of equity has authority to reform a contract, where there has been an error of a material stipulation by mistake. And a policy of insurance is just as much within the reach of the principle as any other contract. But a court of equity ought to be extremely cautious in the exercise of such an authority, seeing that it trenches upon the most salutary rules of evidence, that parol evidence is not to be admitted to vary a written instrument. It ought to be in all cases to withhold its aid, where the mistake is not supported by the clearest evidence according to the understanding of the parties, and upon testimony entirely exact and satisfactory. It is no less danger where the instrument is to be reformed by a preliminary written contract, which it was designed to be."

But even here there is abundant room for caution, for the parties may have varied their intentions, or the clause may have been originally understood by either party to go to the full extent required. And these considerations acquire additional weight when the circumstances have occurred in the intermediate time which have increased importance to the asserted mistake. Under such conditions the doctrine of courts of equity on this subject does not vary with general convenience or justice."

In *Equity Jurisprudence* (sec. 159) it is said: "The relief afforded by courts of equity in cases of this character is not confined to executory contracts, by altering and conforming them to the intention of the parties; but it is extended to solemn instruments which are made by the parties in pursuance of such executory contracts, and, indeed, if the court acted otherwise it would be a great defect of justice, and the main evils of the law would remain irremediable. Hence, in preliminary contracts for conveyances, settlements, and other solemn instruments, the court acts efficiently by reforming the preliminary contract and decreeing a due execution of it as reformed, if no other or other solemn instrument in pursuance of it has been executed. And if such conveyance or instrument has been exe-

cuted it reforms the latter also by making it such as the parties originally intended.

In *Oliver vs. Mutual Commonwealth Ins. Co.* (2 Curtis, 277) the marginal note is as follows: "If a policy when drawn and received does not correctly express a previously concluded agreement for insurance, which it was designed by both parties to execute, equity will reform it. If underwriters conclude an agreement for insurance with one known to them to be merely an agent, and nothing is said as to whose account the insurance is to be made upon the agent has a right to a policy insuring him as agent or for whom it concerns. If the agent makes a mistake in declaring the interest, equity requires it to be corrected and the policy reformed. There is a distinction between the correction of a mistake in a written contract and in the execution of a power; in the latter case courts interpose more willingly. But if the agent did not declare the interest in the wrong person by mistake, but through a fraudulent design, equity will not relieve the principal. If a party fails through mistake to obtain such a policy as he is entitled to by an existing valid contract, equity will relieve, though the mistake arose from ignorance of law."

In *N. A. Ins. Co. vs. Whipple* (2 Bissell, 419) the court says: "It is easy to see how, in the filling up of printed blanks, a mistake like that alleged by the complainant might happen; and the policy clerk says that it occurred from the fact that he was accustomed in the majority of instances to fill up yearly policies. All the other policies were made out for two months; that is, they expired on the 22d of December, 1864, instead of the 22d of December, 1865. This is not contradicted by the defendant. The defendant himself, who personally procured this insurance, has no recollection or does not testify to any, in regard to what transpired at the time he applied for the insurance. He admits that he obtained the insurance at the time mentioned, but does not profess to remember the time the policies were to run, from anything he can now recall of the transaction. It is shown in the proofs, and I presume it would be taken notice of without proof, that fourteen months is an unusual time for the life of an insurance policy. The usual time is two, three, four, six, and twelve months; and if, for any reason, the defendant had had occasion to apply for a policy so much out of the usual course of business it would have made some impression upon his memory and that of the clerks and agents of the insurance company who participated in the transaction. So, also, the fact that only so small an

amount was paid for a policy having so long a time to run, would seem to be a circumstance calculated to excite attention and impose itself upon the memory. It is true that the defendant testifies that he afterwards sent his policies to the insurance agents, to have them looked over and mistakes corrected; but both the agents deny that they ever saw this policy, and assert positively that they supposed the same had expired on the 22d day of December, 1864, and had so entered the same on their books, and so informed the complainant, and had no knowledge that the policy in question was claimed to be in force, until after the fire. Under the evidence in this case I can but conclude that the substantial allegations in the bill are made out by the proofs, and that the complainant is entitled to the relief prayed for."

In *Phoenix Fire Insurance Company vs. Gurnee* (1 Paige, 278) the marginal note is as follows: "A court of chancery has jurisdiction to correct mistakes in policies of insurance, as well as in all other written instruments. The evidence of the mistakes in all cases should be clear and satisfactory." Chancellor Walworth said: "It is well settled that a court of equity has jurisdiction to correct mistakes in policies of insurance as well as in all other written instruments (Phill. on Ins., 14). But the evidence of such mistakes, and that both parties understood the contract in the movement in which it is sought to be reformed, should be clear and satisfactory. In policies of insurance the label or written memorandum from which the policy was filled up is always considered of great importance in determining the nature of the risk and the intention of the parties. Thus in *Motteaux vs. London Insurance Company* (Atk., 347) Lord Hardwicke held that a policy ought to be rectified agreeably to the label; and in the issues which he directed in that case, the label was treated as the real contract between the parties. In this case there is a substantial difference between the policy and the written memorandum on which it is founded."

In *Wood on Fire Ins.*, sec. 484, p. 809, it is said: "When an application for insurance is made and accepted, and a policy is issued, which either by mistake or fraud on the part of the insurer, essentially varies from the contract made, and the policy is not seen or examined by the assured until after the loss thereunder occurs, he is not estopped from seeking a reformation of the contract, upon the ground that he accepted the policy. Thus, where the plaintiffs entered into a contract for insurance with the defendant's agent and paid him the premium, and took from him a receipt stating that the

insurance was for \$10,000 upon 'merchandise generally, contained in their three-story, brick building, metal roof, etc., and occupied by them as a commission house,' and a policy was issued containing all the provisions of the contract except the words 'as a commission house,' and the policy was received by a clerk of the plaintiffs, and its terms were not known to the assured until the loss; it was held that, inasmuch as the insured refused to pay the loss upon goods held by commission, the assured were entitled to have the policy made to conform to the agreement, and could not be said to have accepted the change in the contract, as indicated by the policy. The fact that proceedings are not instituted for its reformation until after a loss, does not of itself bar the remedy. It is a circumstance to be taken into consideration in connection with other circumstances in determining whether the plaintiffs waived the variance, but, if the delay is excused, the remedy remains."

Franklin Fire Ins. Co. vs. Hewitt, 3 B. Mon. (Ky.), 202.

In Van Tuyl vs. Westchester Fire Ins. Co. (55 N. Y., 657), the plaintiff procured insurance upon his stock and materials in his manufactory. One of the printed conditions declared it void in the case of the establishment running, in whole or in part, over or extra time, or running at night, without special agreement. The plaintiffs gave evidence to show that they previously insured with defendant, but had the policy canceled because of the condition above mentioned being in the policy; that plaintiff's agent informed defendant that the United States Insurance Company of Baltimore was writing on the property, and that their policy did not contain that clause; that the defendant thereupon agreed to write as the other companies did and to follow the form of the United States policy, which the plaintiffs were to, and did furnish for the defendant to copy. Plaintiffs thereupon produce a blank form, which the witness testified was a blank policy of the latter company. This was offered in evidence, and was objected to upon the ground that the copy shown defendants should be produced, and that a blank form not filled up was not proper evidence: The objection was overruled and defendant excepted. Plaintiffs also gave evidence tending to show that they did not discover that the permission required was not in the policy until after the fire. The evidence as to the agreement was denied by defendant's agent who effected the insurance. It was held that the plaintiffs were entitled to have the policy reformed. See also Phoenix Fire Ins. Co. vs. Gurnee, 1 Paige, ch. (N. Y.), 278; 1 Bennett Fire Ins. Cases, 257; N. Y. Ice Co. vs. Western Ins.

Co., 23 N. Y., 357; *National Fire Ins. Co. vs. Crane*, 16 Ind., 260; *Harris vs. Columbia etc. Ins. Co.*, 18 Ohio, 116; *Weed vs. Schenectady etc. Ins. Co.*, 7 Lans. (N. Y.), 452; *Bidwell vs. Astor etc. Ins. Co.*, 16 N. Y., 263; *Briosco vs. Pacific Mut. Ins. Co.*, 4 Daly (N. Y. C. P.), 246; *Bunden vs. Orient etc. Ins. Co.*, 2 Keyes (N. Y.), 667; *N. American Ins. Co. vs. Whipple*, 2 Biss. (U. S.), 418; *Malleable Iron Works vs. Phoenix Ins. Co.*, 25 Conn., 465; *Bennett vs. City Ins.*, 115 Mass., 241; *Oliver vs. Mut. Com. Ins. Co.*, 2 Curtis (U. S.), 277; *Moliere vs. Penn. Fire Ins. Co.*, 5 Rawle (Penn.), 342; *National Traders' Bank vs. Ocean Ins. Co.*, 62 Maine, 519; *Lippincott vs. Insurance Co.*, 3 La., 546; *Law vs. Warren*, 6 Irish Eq., 299.

In *Nat. Traders' Bank vs. Ocean Insurance Co.* (62 Maine, 519), it is said: "This is a bill in equity asking the court to reform an insurance policy. The authority of the court to grant the relief prayed for is conceded. The only question is, whether the evidence of mistake is such as to justify the court in exercising its authority. * * * As there can be no recovery upon the policy as it is now written, for the reason that between the voyage insured and the one actually made by the vessel, there would be apparently a fatal deviation; the plaintiffs ask to have the policy reformed so that it will describe the voyage correctly. We think the relief prayed for should be granted. Where, as in this case, an insurance company undertakes to insure the charter of a vessel, after being informed that no copy of the charter has been received, and it is not known how many ports she will be required to use, and through mistake the policy is so written as to limit the vessel to the use of one port, when in fact her charter requires her to use two, we think a court of equity should order the policy reformed, so as to make it describe the voyage correctly. The mistake in this case seems to be established beyond the possibility of doubt. The policy and the charter are both written instruments. A comparison of the two demonstrates that the voyage described in the charter is misdescribed in the policy. Can there be any doubt that this misdescription was the result of mistake? We think not. It is impossible to believe that the applicant for insurance knowingly paid the premium for a void policy. Nor would it be just to the officers of the insurance company to suppose that they took a premium for a policy known to them to be of no value. The conclusion is therefore inevitable, that the misdescription was the result of a mistake—a mutual mistake—a mistake in which both parties participated; and we think equity and good conscience require that it should be corrected.

In *Buckland vs. Adams Express Co.* (97 Mass., 132), the court said : "On a consideration of the facts stated it does not appear to us that the plaintiffs ever did agree that the merchandise in question should be transported on the terms set forth in the receipt which was delivered to the workman at the manufactory when the package was delivered to the defendant's agent. It is not stated that the plaintiffs or either of them ever read the paper containing the alleged regulations or one similar to it. It is agreed that the defendants received and carried like packages of merchandise for the plaintiffs at or about the time the one in controversy was delivered for carriage without giving the plaintiffs any receipt whatever therefor, and that this was the course of dealing between the parties in a large majority of the instances in which the defendants had been employed by the plaintiffs. From this it would appear that the ordinary course of business was for the defendants to receive merchandise from the plaintiffs without attempting to limit their liability as carriers in any manner whatever. Under the circumstances we cannot fairly infer that the plaintiffs understood that by the delivery of a receipt for the merchandise the defendants intended to limit the liability which they ordinarily assumed in their dealings with the plaintiffs, or that the latter understood and assented to the contents of such receipt as fixing the terms on which the defendants were to transport the merchandise."

In *National Fire Ins. Co. vs. Crane* (16 Maryland, 295), the court said : "Whatever effect the want of such an indorsement may have at law, in an action on the policy we think it cannot be urged in a court of equity in a cause otherwise free from objection. The judge below has correctly stated the law on the subject. The indorsement could have been made only by the company. If it be omitted, who is to blame? Certainly not the assured. These policies contain many stipulations, some of them operating as conditions precedent, for the benefit of the company and few for that of the assured. It is too common for application to be met and adjustment refused on frivolous and unjust pretenses, in order to defeat fair claims on contracts of which good faith is the very essence, and we think it would promote the interest of insurance companies, and tend to a higher state of morals in business transactions if they would exhibit more readiness to settle demands upon them than, as we discover from the numerous reported cases on the subject, appears to be usual with them. In this case the president of the company dictated the application himself; the prior insurance was made known to him; the

parties relied upon him; they never went to the office of the company; he came to the counting-house of the complainant, seeking the risk, and after hearing all they had to say on the subject, he departed and soon after sent the policy and received the premium, his clerk saying that it was all right; the only defect, however, being that the company had omitted part of its own duty in not indorsing the former insurance. In such a case we are called upon to say that the party is without remedy; on the contrary, we think it would be a reproach to the jurisprudence of the State, if this company were discharged from their contract on any such ground. There is a distinction in cases where the preparation of an instrument belongs to the party to become liable under it; he ought to be dealt with more strictly: 19 Ves., 259. Insurance contracts are within this principle, and equity will interpose not only in cases of fraud, but also of mistake, where a policy is drawn up in a form different from the application, or anything is omitted which it is the duty of the company to insert or indorse on the instrument: Collett vs. Morrison, 12 Eng. Law and Eq. Rep., 191."

In *Bidwell vs. Astor Ins. Co.* (16 N. Y., 266), it is said: "That the contract of insurance agreed to be made by the defendants was such in its character as the plaintiffs have alleged in their complaint, has been found by the judge and is conclusive upon us. The fact on which the appellants rely, that the policy actually made out was in the plaintiff's hands for a considerable time and until the loss had occurred, was a circumstance to be weighed by the judge as bearing upon the truth of the plaintiff's allegation that the policy did not pursue the contract. It has undoubtedly been considered by the judge, and his judgment has been given notwithstanding that circumstance in favor of the plaintiffs. There is no rule of law which fixes the period within which a man may discover that a writing does not express the contract which he supposed it to contain, and which bars him of relief for delay in asserting his rights, short of the period fixed by the statute of limitations: *Phoenix Ins. Co. vs. Gurnee*, 1 Paige, 278."

It is a matter of common knowledge that a policy of insurance against fire, at the present day, is a lengthy contract, which, after specifying the main things, viz.: the subject, its location, the owner, the amount, the time, and the price, embodies very many stipulations and conditions for the protection of the underwriter. If a person desiring indemnity against loss applies to the underwriter and states the main things above enumerated and says no more, he has knowl-

edge that he has asked for and will receive a contract which, in addition to those, will contain many limiting conditions in behalf of the party executing it; and when he receives the policy he cannot avoid seeing and knowing that there are many more stipulations in it than were covered by his verbal request. It may well be that a due regard for the rights of others requires him to examine those stipulations and express a timely dissent, or be held to an acceptance thereof. Nothing which has previously transpired between him and the underwriter furnishes justification for omission to read them. The underwriter has not invited his confidence by any promise as to what the writing shall contain or omit.

But if the underwriter solicits a person to purchase of him insurance against loss by fire, and if they unite in making a written draft of all the terms, conditions, and stipulations which are to become a part of or in any way affect the contract, and if the underwriter promises to make and sign a copy thereof and deliver as the evidence of the terms of his undertaking; and if a material and variant condition is by mistake inserted and the variant contract is delivered and the stipulated premium is received and retained, the court will not hear the claim that he is entitled to the benefit of the variant condition, where the other party had neither actual nor imputed knowledge of the change.

In his promise to make and deliver an accurate copy there is justification before the law for the omission of the other party to examine the paper delivered and for his assumption that there is no designed variance. A man is not for his pecuniary advantage to impute it to another as gross negligence, that the other trusted to his fidelity to a promise of that character.

The rule of law that no person shall be permitted to deliver himself from contract obligations by saying that he did not read what he signed or accepted, is subject to this limitation, viz.: it is not to be applied in behalf of any person who, by word or act, has induced the omission to read. The defendant has brought to our notice a few of the many cases in which the rule has been plainly declared, but we think that in a few or none of them did the party seeking to enforce it subject himself to this limitation.

There was in the first written draft agreed upon by the plaintiff and defendant the contract between them; in all its terms and conditions it became and has hitherto continued to be operative. The draft of another and variant one has not annulled or affected it because the last has not in the eye of the law been accepted by

or become obligatory upon the plaintiffs. That contract the defendant had the right to rescind; a right which it has possessed in its fullest measure, because it was not affected by the delivery of the variant one, not accepted by the plaintiffs; and if because of its own negligence in omitting to execute and deliver a true copy of the original agreement, it resulted that it was induced to refrain from exercising its right of rescission, it must accept the consequences rather than cast the burden upon the plaintiffs.

There is error in the judgment complained of.

In this opinion the other judges concurred.

UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF NEW YORK.

PROVIDENCE WASHINGTON INS. CO. ET AL.)
 vs.)
 THE SYDNEY ET AL.*)

The libelants issued a running policy to H. M. & Co., "on account of H. M. & Co., for whom it may concern." They subsequently, upon the application of H. M. & Co., issued a certificate of insurance under and subject to the conditions of the said policy; loss, if any, payable to the assured, or order. H. M. & Co., by whom the insurance was effected, were intermediaries between boatmen and shippers. A., P. & Co. were the owners of the cargo. The certificate by which the cargo was insured, under and subject to the conditions of the running policy, was obtained by H. M. & Co. at the request of A., P. & Co. The libelants' dealings were entirely with H. M. & Co. In consequence of negligence on the part of the carrier, a total loss ensued. The libelants, upon an abandonment by A., P. & Co. and H. M. & Co. of their interests in the property, paid the insurance in full, and filed a libel against the carrier for negligence. *Held*, That the certificate and policy are to be read together; and when so read, constitute a contract to insure H. M. & Co. for themselves, and for those whom they might represent, having insurable interests in the premises, and that both H. M. & Co. and A., P. & Co. were embraced therein. The intention of the person who effects the insurance, whether known to the insurer or not, determines the application of the clause.

Payment of a total loss works an equitable assignment of the property, and the insurer may, after payment to the assured, charge the carrier for negligence in destroying property which has become his. The insurer, upon subrogation to the rights of the assured, becomes the real party in interest, and may maintain the suit in his own name.

When a loss occurs in consequence of an explosion of the boiler, a presumption of negligence on the part of the carrier is thereby created, which those who are responsible must rebut by proof of due care, or by showing the existence of circumstances over which they had no control, and to which the result may be fairly attributable.

Although the answer denies negligence, it admits facts which raise a presumption of negligence, but as the apostles indicate that the question of

* Decision rendered, March 17, 1886.—From *Federal Reporter*.

as not been fully entered into, and as the claimant has relied
ory that the facts found did not make out a prima facie case
he may be permitted to apply for leave to introduce further
his regard.

ty.
McCARTHY, for Appellants.
LABRISKIE, for Claimant.

WALLACE, J.

this cause avers, in substance, that the libelants, in-
rations engaged in the business of marine insurance,
y of insurance agree to indemnify Armour, Plankinton
ners of a certain cargo of wheat on board the canal-
upon a voyage from Buffalo to New York, against the
d perils of the voyage; that there was a total loss of
n the voyage, and an abandonment by the owners to
that the canal-boat *Worden*, upon the voyage, was
e steam canal-boat *Sydney*, and was entirely dependent
y for motive power; that both the *Worden* and the
owned by the same persons; that the loss occurred by
e of the persons in charge of the two boats, in conse-
ch the *Worden* was driven upon the rocks of Esopus
Hudson River, and sank; that the libelants became
owners of the cargo in the sum of \$9,211.75 as for a
paid that sum to them as the insurance upon said
y libelants became subrogated to the owner's cause of
the vessels. The answer of the claimant admits that
ner of both vessels; denies that the libelants insured the
cargo of the *Worden*; alleges that the policy insured
s carrier of the cargo; denies all averments of negli-
s that the *Worden*, while being towed by the *Sydney*,
irely under the control and management of the *Sydney*,
ks upon Esopus Island, and sunk; admits that these
wn rocks, easily avoidable ordinarily by tow-boats and
d avers that the *Worden* foundered by reason of the
he boiler of the *Sydney*, whereby that steamer was
rol her movements, and was carried by the tide and
Worden struck the rocks. The answer further alleges
ant paid the premium to the libelants for the insur-
e agreement that the payment of any loss or damage
n transitu should accrue to the benefit of the claimant,
m from his liability for such loss as a common carrier.

ST. ALBANS
V. WASH. INS. CO.
ET AL. VS. THE SYDNEY
ET AL.

The district court dismissed the libel, and upon this appeal by the libelants the following facts are found:—

(1) Prior to the seventeenth day of May, 1883, the libelants issued and delivered to the firm of H. Morse & Co., of Buffalo, New York, a policy of insurance, reciting that "on account of H. Morse & Co., for whom it may concern, they do insure the several persons whose names are hereafter indorsed on the policy as owner, advancer, or common carrier of goods, merchandise, or produce on his own boat, or boats belonging to others, loaded on commission or chartered, from place to place as indorsed hereon, or in a book kept for that purpose, for the several amounts at the rate and on the goods, merchandise, or produce as specified in the indorsement, beginning the adventure upon the goods, merchandise, or produce from and immediately following the landing thereof at the port or place of the indorsement, and, continuing the same until the goods, merchandise, or produce shall be safely landed at the port of destination." The policy, among other things, excepted from the risk all losses arising from want of ordinary care and skill in lading or navigating the boats.

(2) On the seventeenth day of May, 1883, Morse & Co. applied to the agent of the libelants at Buffalo for insurance upon a cargo of wheat, to be carried on board the canal-boat *William Worden* from Buffalo to New York, and requested the loss, if any, to be made payable to Morse & Co., or order. Thereupon the agent of the libelants entered in the book a memorandum designating Morse & Co. as the persons on whose account insurance was effected, describing the boat, cargo, and voyage, and specifying the amount insured upon the cargo on the voyage, from Buffalo to New York, as \$9,875, and the premium as \$14.82. At the same time the agents of the libelants delivered to Morse & Co. a certificate certifying that Morse & Co. were insured under and subject to the conditions of the policy before mentioned, in the sum of \$9,875 on cargo of wheat on board boat *William Worden* from Buffalo to New York, loss, if any, payable to assured, or order.

(3) At the time when the foregoing policy and certificates were executed and issued by the libelants, Morse & Co. were doing business at Buffalo as intermediaries between boatmen and shippers of cargo in procuring cargoes to be shipped for a commission. They were applied to by the owner of the canal-boat *Worden* to procure him a cargo for New York. They thereupon applied to one Meadows, who was an agent for Armour, Plankinton & Co., for a cargo,

and agreed with him to transport 7,900 bushels of wheat from Buffalo to New York on the boat *Worden*, and to insure the same for a freight of five cents per bushel. Thereupon they entered into a contract with the owner of the *Worden*, evidenced by a bill of lading, in which they were described as shippers of the cargo for transportation of the cargo to New York, and procured the certificate of insurance aforesaid, and indorsed and delivered to the agent for Armour, Plankinton & Co., and at the same time entered into a contract with him for the transportation of the cargo to New York, evidenced by a bill of lading in which they described themselves as carriers, and Armour, Plankinton & Co. as shippers.

(4) At the time Morse & Co. executed and delivered the bill of lading to the agent of Armour, Plankinton & Co., the claimant, as master of the *Worden*, also executed a duplicate bill of lading, describing himself as carrier, and delivered it to said agent.

(5) By the agreement for the transportation of the cargo between Morse & Co. and the claimant, the latter was to receive five cents per bushel as freight, less the amount to be paid as premium for insuring the cargo, and less a commission of five per cent upon the whole freight money to Morse & Co.

(6) Morse & Co. advanced to the agent of Armour, Plankinton & Co. \$200 for prior advances made by the agent upon the wheat, and by the bills of lading the cargo was to be delivered upon payment of this advance and the freight.

(7) At the time of making application for the insurance, receiving the certificate, and signing the several bills of lading, it was understood between Morse & Co. and the claimant that the latter owned the *Worden* and the *Sydney*, and intended to tow the *Worden* by the *Sydney* on the voyage.

(8) Upon the voyage the *Worden* was wholly under the control of the *Sydney*, and both boats were navigated as one vessel practically; and on the twenty-eighth day of May, 1883, while proceeding on the voyage down the Hudson River the *Worden* struck the rocks on Esopus Island, and sunk, and her cargo was damaged to the amount of \$6,175.89. These were well-known rocks, easily avoidable by vessels.

(9) There is no evidence of any negligence on the part of those in charge of the navigation of the *Worden* or the *Sydney* except such as appears from admissions in the answer of the claimant.

(10) June 26, 1883, the libelants paid to Armour, Plankinton & Co. the sum of \$9,211.75 on account of the loss of the cargo in-

sured; and upon an abandonment by the owners to the libelants, and about the same time, they paid to Morse & Co. the sum of \$520, in full for their interest in the cargo.

It is to be observed that the cause of action upon which the libel proceeds is for negligence. It is not claimed that the vessels, or either of them, are liable because of a breach of the carrier's contract. The libelants assert that they have succeeded to the rights of Armour, Plankinton & Co., as the owners of the cargo of the *Worden*, to recover against both boats because of loss sustained by reason of the negligent navigation of the boats. There is no allegation in the libel that the libelants have succeeded to the rights of Armour, Plankinton & Co. by an assignment of the cause of action. The libelants rely purely upon subrogation. The case consequently presents two questions: First, whether upon the facts a cause of action existed in favor of Armour, Plankinton & Co. against one or both of the vessels at the time of the payment to them of the loss by the libelants; and, second, whether the libelants stand by subrogation in the place of Armour, Plankinton & Co. to enforce that cause of action. If Armour, Plankinton & Co. were not entitled to the insurance, as between themselves and the libelants, under the policy and certificate, the libelants cannot recover.

Treating the case as though Armour, Plankinton & Co. were libelants, their right to recover against the vessels would not be affected by the fact that they had been paid the full amount of their loss by the insurers: The *Monticello*, 17 How., 152. If the insured owner has accepted payment from the insurer, the latter may use the name of the assured to obtain redress from the persons whose conduct caused the loss. At law, the insurer, upon subrogation to the rights of the assured by payment of the loss, can only maintain such a suit in the name of the assured: *Gales vs. Hailman*, 11 Pa. St., 515; *Hart vs. Western R. Co.*, 13 Metc., 99; *Hall vs. Railroad Cos.*, 13 Wall., 367; *Mercantile Ins. Co. vs. Calebs*, 20 N. Y., 173. In admiralty, however, there seems to be no reason why the insurer may not, as in equity, maintain the suit in his own name as the real party in interest: *Fretz vs. Bull*, 12 How., 466; *The Monticello vs. Morrison*, 17 How., 155. As the libelants have paid Morse & Co. for their interest in the loss, all the parties whose rights are involved are before the court.

Although the answer denies negligence in the navigation of the vessels, it admits facts which raise a presumption of negligence. It admits that the *Worden*, while upon her voyage on the Hudson

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the insured had against the others for the loss. The question is, then, whether Armour, Plankinton & Co. were insured to the extent of their interests as owners of the cargo; under the policy and certificate issued by the libelants to Morse & Co.

The contract of insurance is found in the policy and certificate, supplemented by such extrinsic evidence as may be properly received to explain but not to contradict their terms. The policy is a running or floating policy, intended to cover future shipments of goods or produce. Its phraseology respecting the persons and interests to be insured is somewhat equivocal, owing doubtless to the fact that the words "on account of H. Morse & Co. for whom it may concern," were written into the printed form adapted to insure all persons who might become parties to it by indorsing their names thereon. By its terms, the voyage, the amount to be insured, the property, and the rate of premium are to be described by an indorsement upon the policy or in a book kept for that purpose; such indorsement to be approved and signed by the libelants. It is to be read as though the libelants undertook to insure Morse & Co. for themselves, and those whom they might represent in procuring insurance, and also undertook, at the request of Morse & Co., to insure any other persons having an interest as owners, advancers, or common carriers whose names and interests should thereafter be indorsed upon the policy. When the names of Morse & Co. were inserted in it, it was appropriate to meet the different classes of transactions which an insurance by them might represent. It was such as would enable them to effect an insurance in their own name when they had any interest in the risk as advancers or carriers, or to obtain insurance for the owner, advancer, or carrier, and in his name, if they desired or had no interest themselves. Upon the correct construction, insurance effected in the name of Morse & Co. was to inure to the benefit of all concerned,—that is, for the benefit of all for whom they acted in obtaining insurance; and when insurance was not effected in the name of Morse & Co. the name of the person to be insured, with a statement of his interest, was to be indorsed on the policy, and he would thereby become the assured. Upon any other construction the words "for whom it may concern" are nugatory. Insurance in the name of another might sometimes be desirable when Morse & Co. had no interest in the transaction other than that of agent for procuring cargoes, and insurance upon them, for others for a commission.

No indorsement was made upon the policy of the name of the person insured; but upon the application for the insurance the memorandum of the property, the voyage, the amount of insurance, and the rate were entered by the libelants in the book kept for that purpose as recited in the certificate delivered by them to Morse & Co. The certificate and policy are to be read together, and, so read, form a contract between the libelants and Morse & Co. to insure the latter "for whom it may concern." This was an insurance for Armour, Plankinton & Co. to the extent of their interests as owners of the cargo, because the proofs show indisputably that Morse & Co. obtained the insurance at the request and for the protection of Armour, Plankinton & Co. It was also an insurance for the benefit of Morse & Co. to the extent of their interests as carriers and for advances.

Although the general rule is that, if a policy insures the interest only of the person named in it, no other person can show that it was also intended to cover his interest, it is otherwise if the policy contains the phrase "for whom it may concern;" and under such a policy the intention of the person who effects the insurance determines the application of the clause. The insurance effected by him insures all who have an insurable interest in the property to the extent of their interests, where there is previous authority or subsequent ratification of an insurance obtained for them. This is so whether the intention of the person effecting the insurance is known to the insurer or not; and the persons whose interests are thus insured may sue upon the policy in their own name, and a recovery by one inures to the benefit of all, and bars a recovery by the others. The phrase ordinarily applies, however, only to those who are contemplated at the time of the insurance, and who then had an insurable interest in the subject-matter: 1 *Para. Ins.*, 45; *Hopper vs. Robinson*, 38 U. S., 528; *Henshaw vs. Mutual Safety Ins. Co.*, 2, *Blatchf.*, 99; *Hermann vs. Louisiana State Ins. Co.*, 7 La., 502; *Duncan vs. Sun Ins. Co.*, 12 La. Ann., 486; *Buck vs. Chesapeake Ins. Co.* 1 *Pet.*, 151; *Rogers vs. Traders' Ins. Co.*, 6 *Paige*, 583.

It is not apparent how the libelants, after payment of the loss to Armour, Plankinton & Co., maintained any different position, in respect to their rights to recover against the vessel, than would have been occupied by Armour, Plankinton & Co. if the suit had been brought by them before payment of the loss. The libelants did not, by paying the loss, admit, in favor of the claimant, that the loss was one within the risk of the policy, and therefore not within one of

the accepted risks as a loss arising from the want of ordinary care in navigating the boat. They were obliged to pay the loss to Armour, Plankinton & Co. before they could assert any claim against him. When they paid it, they became Armour, Plankinton & Co. for the purposes of enforcing the cause of action. They would doubtless be precluded from maintaining an action against Armour, Plankinton & Co to recover back the payment unless they could show fraud or mistake. But it is impossible to see how this circumstance can prejudice them in an action against a third person. Moreover, if the payment should be treated as an admission on the part of the libelants of their understanding, at the time, that the loss was one within the terms of the policy, and did not arise from an accepted risk, nevertheless, the evidence now is, that the loss arose by reason of the negligence of those in charge of the vessels.

The decision in the court below, as appears by the opinion of the learned district judge, was placed upon the ground that the insurance effected by Morse & Co. was an insurance for themselves only; but, if otherwise, was intended by them to cover the insurable interest of the claimant in the cargo as a carrier; that the insurance therefore inured to the claimant's benefit as well as to that of Morse & Co. and Armour, Plankinton & Co., and protected him to the extent of his liability as carrier for the delivery of the cargo to the owner; and that payment to the owner was, in legal effect, payment to him, and concluded the insurers from maintaining the suit without affirmative allegations and proof that the payment was made upon a mistake of facts.

If Morse & Co. were the only parties insured, the libel was properly dismissed, if for no other reason, because it does not proceed upon the theory that the libelants have succeeded to any rights by subrogation except to those of Armour, Plankinton & Co. But the conclusion that Morse & Co. were the only parties to the contract can only be reached by refusing to give any effect to the phrase in the policy "for whom it may concern." That phrase is meaningless if it does not mean that an insurance effected in their names is to extend to all for whom they are authorized to insure. If the policy were to be interpreted as intended to insure only those persons whose names and interests should be indorsed upon it, then it would read as though the phrase "on account of Morse & Co., for whom it may concern," were altogether omitted. With the phrase inserted, it is unnecessary to indorse the name subsequently upon the policy, but all become parties, "for whom it may concern,"

to any insurance which may be effected upon their application. Upon any other construction of the policy it would have been useless to insert the name of Morse & Co. in the policy at all.

If the libelants were attempting to enforce a cause of action against the claimant for a breach of his obligations as a carrier, and if they had insured him as carrier, as well as Morse & Co. and Armour, Plankinton & Co., it would seem very clear that they could not succeed. In such a case they would be attempting to reclaim moneys which they had agreed to appropriate in part for his indemnity against the very loss which had arisen,—a fund which became his to an extent commensurate with his obligations as a carrier as soon as the loss took place. But they do not seek to recover back money which they have paid him, or paid to some one else in part for him, in discharge of their contract of indemnity. They seek to charge him for negligence in destroying the property which has become theirs by an equitable assignment from the owner.

The proofs do not show that the interest of the carrier was intended to be insured by Morse & Co. when they applied for the insurance and procured the certificate. If, as was thought to be the fact by the district judge, the premium was paid for the insurance by the claimant, that circumstance would be quite controlling to indicate an understanding between Morse and himself that his interest should be protected by the insurance. The evidence is that he agreed, through Morse & Co., with the agent of Armour, Plankinton & Co., to pay the premium as a part of the consideration of the contract for transportation. In other words, he agreed for \$395 to transport the cargo to New York, and pay the premium for insurance. He paid it out of the \$395 received from Morse & Co., and in no other way. The owners paid the premium when Morse & Co. were paid by them.

Considerable evidence was elicited from the witnesses for the purpose of showing usage among shippers, insurers, and boatmen at Buffalo, to the effect that insurance procured under circumstances similar to those in this case is understood to protect the carrier as well as all other persons interested in the safe transportation of the cargo. The evidence falls short of establishing such a usage. It is loose, conflicting, conjectural, and equivocal. See *Donnell vs. Columbian Ins. Co.*, 2 Sum., 366; *The Eddy*, 5 Wall., 481; *Bolton vs. Colder*, 1 Watts, 360; *U. S. vs. Buchanan*, 8 How., 83, 102. So far as this evidence tends to show that Morse & Co., when they pro-

cured the insurance, intended to obtain it for the benefit of the carrier as well as for the owners and themselves, it is legitimate; but it is not persuasive, in view of the fact that the insurance was procured at the request of the owners, and as a condition of the contract for transportation, and the further fact that there was no conversation between Morse & Co. and the master of the *Worden*.

Those considerations lead to a reversal of the decree of the district court. The apostles indicate that the question whether the claimant was guilty of negligence in the navigation of the boats has not been fully litigated, and that the claimant has mistakenly relied upon the theory, that the facts proved did not make out a *prima facie* case against him. It is therefore deemed proper to permit the claimant to apply for leave to introduce further evidence upon the question whether the loss arose from the want of ordinary care and skill in the navigation of the boats. Unless such an application is made within twenty days, a decree will be entered for the libelants in the sum of \$6,175.89, with interest from May 28 1883, with costs in this court and in the district court.

SUPREME COURT OF WISCONSIN.

BUSSINGER

vs.

BANK OF WATERTOWN.*

Where, in an action against a bank to recover the value of certain life policies, which plaintiff had assigned to it on the ground that he was in a state of intoxication at the time, and did not comprehend the transaction, the statements of the plaintiff made to the company, though differing from and inconsistent with such an averment, do not operate as an estoppel against him, so as to deprive him of the right of having the question of his state of mind at the time of the assignment submitted to the jury; and when there is any evidence of intoxication at the time, the plaintiff cannot be nonsuited.

Where an action is brought to recover certain life policies, or their value, which had been assigned by plaintiff, on the ground that he was in a state of intoxication at the time and did not comprehend the transaction, if the evidence sustains the allegation, the contract will be rescinded, and it is not necessary first to bring a suit in equity to have the assignment declared void.

The owner of a policy of insurance, issued upon the life of the assured himself, may be assigned by the assured to any other person, with the assent of the company.

GEORGE W. BIRD, for Appellant, Bussinger.

HARLOW PEASE, for Respondent, Bank of Watertown.

TAYLOR, J.

The appellant brought this action to recover of the respondent the value of two life insurance policies for \$1,000 each, on the life of the appellant. One policy was a ten-year policy, and all the premiums thereon were fully paid at the time of the alleged assignment thereof by the plaintiff to the respondent. The other was what is

* Decision rendered, Nov. 3, 1886.—From *Northwestern Reporter*.

called an endowment policy, payable at the expiration of fifteen years from the date thereof, to wit, February 7, 1886. All the premiums on the policy had been fully paid up to the date of said alleged assignment, viz., October 13, 1883. The respondent held the possession of these policies at the time of the commencement of this action by virtue of an assignment of each of said policies, made by the plaintiff to the bank, bearing date October 13, 1883. The only premium paid on either of the policies by the respondent was the last premium on the endowment policy, payable February 7, 1886, \$66.02. Both policies were assigned by the appellant to the bank on the 13th of October, 1883, by written assignments executed by the appellant under seal. The assignments were made for the purpose of securing the payment to the bank of several notes held by said bank against the father of the appellant, and such assignments were made at the request of his father for the purpose above stated. The notes for which the bank claims to hold such policies were unpaid at the time the action was commenced. The policies were duly demanded of the bank before the commencement of the action, and the bank refused to deliver them to the appellant.

The grounds upon which the appellant claims the right to the possession of the policies or their value are the following: First, he alleges that when he made the assignment he was, by reason of drunkenness, wholly incapable of making an assignment; and, second, that the assignments are void in law because they were made to a party having no insurable interest in the life of the plaintiff.

The allegations of the complaint upon which it is claimed that the plaintiff should not be bound by his assignment, on account of the condition of his mind at the time the same was made, are as follows: "That, at the time the defendant so obtained the plaintiff's signature to said paper or papers, the plaintiff's mind was so crazed, confused, and debilitated, and he was in such a state and condition of mind, to defendant's knowledge, that he was unable to, and could not and did not, understand or comprehend the transaction at all, or what he was doing, and that he was unable to, and did not and could not, understand or comprehend or know what the said paper or papers were, or that he was making or signing any kind of transfer or assignment of said policies, or either of them, to the defendant, or to any other person, for any purpose whatever; that at the time last aforesaid the plaintiff's mind was so much diseased, debilitated, and crazed by and from the effects of intoxicating liquors, then and therefore taken and drank by him, that he was, to defend-

ant's knowledge, unable to, and could not and did not, at all comprehend or understand what he was then doing, or the transaction then had, or that he was making or signing any kind of transfer or assignment of said policies, or either of them, to the defendant, or to any one else, for any purpose whatsoever."

Upon the trial, after hearing the evidence offered by the plaintiff, the learned circuit judge, on motion of the defendant, ordered that the plaintiff be nonsuited, to which order the plaintiff duly excepted, and from the judgment entered upon such nonsuit the plaintiff appeals to this court.

Upon an examination of the evidence given on the part of the plaintiff, as to the condition of his mind at the time he executed the assignments, we are clearly of the opinion that such evidence tended to prove the allegations of his complaint upon the question of his capacity to execute such assignments at the time the same were made. The evidence tended to show that, by reason of his intoxication, he was incapable of comprehending what he was doing at the time he executed said assignments, and was therefore within the well-established rule of law that a drunkard, when in a complete state of intoxication, so as not to know what he is doing, has no capacity to contract: 1 Benj. Sales (Amer. Ed. Corbin), 42; Gore vs. Gibson, 13 Mees. & W., 623; Cooke vs. Clayworth, 18 Ves. Jr., 12; Story, Cont. (4th Ed.), §§ 44, 45, and cases cited in notes; Belcher vs. Belcher, 10 Yerg., 121; French vs. French, 8 Ohio, 214; Jenners vs. Howard, 6 Blackf., 240; Mitchell vs. Kingman, 5 Pick., 431; Webster vs. Woodford, 3 Day, 90; Seaver vs. Phelps, 11 Pick., 305; Rice vs. Peet, 15 Johns., 503.

It is not very seriously contended by the learned counsel for the respondent that the evidence of the plaintiff's incapacity, by reason of drunkenness, to make the assignments at the time they were made, was not sufficient to carry the case to the jury on that question; but it is contended that the subsequent acts of the plaintiff in relation to the matter estopped him from now alleging his drunkenness in avoidance of the assignments. The only fact shown in the plaintiff's evidence which is inconsistent with his claim that he was so drunk at the time as not to know what he was doing, is a subsequent written communication to the insurance company upon the subject of said assignments, in which the plaintiff states that such assignments were obtained from him by fraud and conspiracy between the bank and the father of the plaintiff, and that he was told at the time he executed them that the assignments were a matter of

form, and a temporary arrangement only, for the purpose of accommodating his father; and that he was induced to execute said assignments by the urgent request of his father, without time to consider upon the matter, or take advice in relation thereto. The communication is set forth at length in the bill of exceptions. This communication, it is true, tends to throw suspicion upon the claim now made by the plaintiff that he was in such a state of mind at the time he executed the assignments as not to comprehend what he was doing; but is not conclusive upon that question, and, notwithstanding this communication to the company, he has the right to ask the court and jury to pass upon his mental condition at the time the assignments were made. There is nothing in the nature of an estoppel against the plaintiff by reason of this communication to the insurance company. It is a mere statement of appellant's, somewhat in conflict with the claim now made by him on the trial, and leaves the truth of the matter still to be ascertained. There is no pretext that the defendant has been in any way affected to its prejudice by said statement, and in fact, it does not appear that the defendant knew of the statement until long after this action had been commenced. The following cases, cited by the learned counsel for the appellant, show that there is nothing in the nature of an estoppel on the plaintiff by reason of the statement made by him to the company: *Husbrook vs. Strawser*, 14 Wis., 403; *Dahlman vs. Foster*, 55 Wis., 382; s. c., 13 N. W. Rep., 264; *Warder vs. Baldwin*, 51 Wis., 450; s. c., 8 N. W. Rep., 257; *Warder vs. Baker*, 54 Wis., 49; s. c., 11 N. W. Rep., 342; *Guichard vs. Brande*, 57 Wis., 534; s. c., 15 N. W. Rep., 764; *Winegar vs. Fowler*, 82 N. Y., 315-318.

We think the court erred in taking the case from the jury upon the question of the capacity of the plaintiff to execute the assignments at the time the same were made.

It is insisted by the learned counsel for the respondent that if there was evidence on that point sufficient to carry the case to the jury, still the nonsuit should be sustained on the ground that the contract is simply voidable, not void, and the title to the policies passed to the defendant by the assignments; and that no action at law will lie, either to recover the policies or their value, until such assignments are set aside by an action in equity. This court has repeatedly held that a contract of sale may be rescinded by either party on account of the fraud of the other, and, when so rescinded, he may bring an action at law to recover of the other party what he has paid or given to the other party on such contract. In this case the plaintiff had

received nothing on the sale of the policies, and his demand for a return of them was all that was necessary to a rescission of the contract of sale. We think he can maintain the action for the policies or their value, if he succeeds in showing the assignment was void on account of his drunkenness at the time of the sale. See cases cited by the learned counsel for the appellant on this point.

For the error above stated, the judgment of the circuit court must be reversed. But the learned counsel for the appellant contends that the assignments in this case are void at law, because assigned to a party who has no insurable interest in his life, and therefore, independent of the question of his incapacity to make the assignments on account of his drunkenness, he is entitled to recover upon that ground. As there must be a new trial in the case, where this point may be pressed upon the circuit court, and the point having been fully argued on this appeal, we feel called upon to give our opinion upon that question.

We think this question has been decided against the appellant by this court in the following cases cited by the respondent: *Archibald vs. Insurance Co.*, 38 Wis., 542; *Clark vs. Durand*, 12 Wis., 248; *Kernan vs. Howard*, 23 Wis., 108; *Foster vs. Gile*, 50 Wis., 603; s. c., 7 N. W. Rep., 555, and 8 N. W. Rep., 217. There being no question but that the policy was originally obtained for the benefit of a person having an insurable interest in the life of the assured, the policy being upon the life of the assured himself, that the owner of such policy may thereafter lawfully assign the same to any person, with the assent of the insurance company, is sustained by the great weight of authority, and, as we think, by sound principles of law. See the following authorities: *St. John vs. Insurance Co.*, 13 N. Y., 31; *Valton vs. Assurance Co.*, 20 N. Y., 32; *Olmsted vs. Keyes*, 85 N. Y., 593; *Lemon vs. Insurance Co.*, 38 Conn., 294-302; *Fairchild vs. Mutual Life Ass'n*, 51 Vt., 625; *Clark vs. Allen*, 11 R. I., 439; *Ashley vs. Ashley*, 3 Sim., 194; *Insurance Co. vs. Allen*, 138 Mass., 24; *Harrison vs. McConkey*, 1 Md. Ch., 34; *Angel, Fire Ins.* § 325; *Langdon vs. Insurance Co.*, 22 Amer. Law Reg., 385; *Campbell vs. Insurance Co.*, 98 Mass., 381; *Palmer vs. Merrill*, 6 Cush., 282.

The only case cited by the learned counsel for the appellant which really holds a different doctrine is *Insurance Co. vs. Sturges*, 18 Kan., 93. The case of *Insurance Co. vs. Hazzard* (41 Ind., 116) was a case where the assured, after paying two annual premiums, announced to the company that he should not keep up the policy, and he declined to pay a premium then past due. Shortly after-

wards he assigned the policy to Hazzard for the sum of \$20. The premium paid by the assured was \$62.40. The court says: "The question arises whether a person can purchase and hold for his own benefit, and as a matter of mere speculation, a policy of insurance on the life of one in whose life he has no insurable interest."

It might well be said that the purchase of the policy in this case, after the holder determined not to continue it, was equivalent to taking out an original policy on the life of the assured. All the cases cited by the learned counsel in the courts of the United States were cases where it was evident the original policies were taken out for the benefit of the persons to whom they were immediately assigned, and who in fact paid the premiums on the policy from the beginning. Taking out the policies in the names of the assignors in those cases was clearly a cover for acquiring a wager policy on the life of a person in whom the person really insured had no insurable interest. The language of the learned justice of the Supreme Court of the United States who wrote the opinion in the case of *Warnock vs. Davis* (104 U. S., 775), when considered in the light of the facts of the case, does not conflict with the rule laid down by this court and the courts above mentioned.

Whatever objection there might be to allowing the assignment of a life policy, upon which the future premiums are to be paid, during the life of the assured, no such objection can be fairly raised against the assignment of a policy upon which all the premiums have been paid, and the payment of the amount due is alone dependent on the death of the assured, nor to the assignment of an endowment policy, where nearly all the payments have been made. It is not an established rule of law that every contract is void which gives the party to it a pecuniary interest in the death of the other party, or of a third person. If that were the law, then every conveyance, will, or other instrument, which conveyed to another an estate in reversion, would be void, as the reversioner is certainly interested in the speedy demise of the person owning the life estate. There would seem to be no greater reason for holding void a sale or assignment of a life insurance policy, which has been obtained in good faith by the holder, to a third person, with an agreement on his part to pay the future premiums, and receive the insurance money on the death of the assured, than there would be for holding that a person who held a life estate in real property could not lease such estate for the term of his life to the reversioners, upon the payment of a stipulated annual rent to be paid to the party having the life estate. In

that case, the party taking the life lease would have just as much interest in the speedy death of the holder of the life estate as the purchaser of an insurance policy upon which annual premiums are to become due has in the death of the assured.

The mere fact that a person who becomes the purchaser of a life policy may thereby become interested in the speedy death of the person to whom the policy is issued, can be no legal ground for holding such purchase void. In all the decided cases where such assignments have been held void, there has also existed the fact that the assignee or purchaser has taken the policy, not in good faith, paying the value thereof, but as a speculation upon the life of the party in whom he has no interest, and so the transaction has been brought within the rule against wagering policies. Nor are we able to perceive why the holder of a valid policy should be prevented from realizing the value of the same to him, before his death, by a bona fide sale or assignment thereof. Such sale or assignment may, in fact, be absolutely necessary in order to get any benefit of his policy. The holder may have paid thousands of dollars in premiums, through a long series of years, and a time may come when he becomes unable to pay the premiums to become due, and he must either sell his interest in the policy, or suffer it to lapse, and lose all the premiums paid. Under such circumstances, can there be anything against public policy or the law which will prevent the unfortunate holder of the policy from selling the same for the best price he can, and so get some benefit of his previous payments? We think not. The only reason for holding such sale void is because it gives the purchaser a pecuniary interest in his speedy death, and, as we have seen above, that fact alone has never been held sufficient to render a contract void. So far from this fact being a cause for holding the contract void, the law of this State expressly sanctions the issuing of wager policies for the benefit of a married woman, and thus, in all such cases, gives her a pecuniary interest in the speedy death of the person so insured for her benefit. See section 2,347, Rev. St., 1878.

But there is another ground upon which the assignment of the policies in this case can, we think, be upheld in case the plaintiff was at the time competent to make them, viz., the person for whose benefit in part they were made had an insurable interest in the life of the plaintiff. The evidence shows that the assignments were made as security for a debt due from the father of the assured to the bank, and so was for the benefit of the father as well as of the bank.

That the son has an insurable in his father, and the father in the son, would seem to be supported by the authorities. See *Insurance Co. vs. France*, 94 U. S., 561; *Loomis vs. Insurance Co.*, 6 Gray, 399; *Forbes vs. Insurance Co.*, 15 Gray, 249; *Insurance Co. vs. Kane*, 81 Pa. St., 154; *Warnock vs. Davis*, 104 U. S., 775; *May, Ins.*, §107, p. 113, and cases cited: *Williams vs. Insurance Co.*, 31 Iowa, 541; *Mitchell vs. Insurance Co.*, 45 Me., 104; *New York vs. Insurance Co.*, 3 Bosw., 440.

It is held in the case of *Insurance Co. vs. France*, *supra*, that the relationship of the parties divests the policy of those dangerous tendencies which render those policies contrary to good morals; and in the *Pennsylvania* case it was held that a statutory provision requiring the father to support the son, and the son the father, in case either required the support of the other, was a sufficient interest to support a life policy.

For the reason that the record discloses the fact that the plaintiff produced evidence on the trial tending to show that he was incompetent, on account of intoxication, to make the assignments in question at the time they were made, it was error for the circuit court to nonsuit the plaintiff, and for that error the judgment must be reversed.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

UNITED STATES CIRCUIT COURT.

NORTHERN DISTRICT OF ILLINOIS.

MARGARET HAWKSHAW

vs.

SUPREME LODGE KNIGHTS OF HONOR.*

Suspension or non-payment of assessments defeats the good standing of the member of a benevolent society, and insanity or tender to an unauthorized party will not excuse non-payment.

Conditions of the constitution as to re-instatement must be complied with, and the decision of a tribunal provided by the constitution and by-laws as to re-instatement is binding.

Where a widows and orphans' benefit fund and a sick benefit fund are constituted as separate, benefits attaching to the one cannot be paid from the other.

In order to share in sick benefits the prescribed rule of reporting to the lodge and securing its favorable action must be followed.

The records of the lodge cannot be contradicted by parol.

E. G. ARAY and W. C. ARAY, *for Plaintiff.*

JAMES O. PIERCE and C. C. BONNEY, *for Defendant.*

The action was brought upon a benefit certificate, issued by defendant to the husband of plaintiff, and in which he had named the plaintiff as his beneficiary.

The benefit certificate was conditioned that the member should comply "with the laws, rules, and regulations now governing this order, or that may hereafter be enacted for its government," and should be "in good standing at the time of his death;" and the declaration averred that Hawkshaw had complied with all those laws,

* Decision rendered, January 17, 1887.

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rules, and regulations up to the time of his death, August 21, 1884, and was then in good standing.

The plea set up the suspension of Hawkshaw and his loss of good standing by his failure to pay in August, 1883, an assessment of which he had received due notice, and his failure to secure re-instatement or to pay any of several later assessments; and the replications set up by way of excuse for such failure, the various matters referred to in the opinion of the court.

The constitution of the order contained the following provisions for re-instatement of suspended members :—

“ Art. VII. Sec. 3.—A member of this order who has been suspended for non-payment of dues, fines, or assessments, applying to be re-instated, must, as a condition precedent, pay the full amount he is in arrears for dues and all assessments and fines charged at the date of suspension, but said re-instatement must be applied for and made within one year after suspension; provided, that all applicants for re-instatement, after they have been suspended for more than thirty days, shall furnish this lodge a favorable certificate from the medical examiner thereof, in form prescribed by the supreme lodge approved by the State medical examiners of the grand jurisdiction in which the lodge is situated; and provided further, that all persons applying for re-instatement within thirty days from the date of suspension need not be examined by the physician, unless so ordered by this lodge; a ballot shall then be ordered in all cases, and if a majority of the ballots casts are favorable, the applicant shall be re-instated, but if either the medical examination or ballot is unfavorable the applicant shall stand suspended, and can only become a member under the rules governing new applicants.”

The other material facts of the case are stated in the opinion of the court.

The case was tried by the court, the parties having by stipulation waived a jury.

BLODGETT, J.

This is a suit for the collection of the sum of \$2,000 which, it is claimed, accrued and became payable to the complainant from the defendant, on the death of her husband, William Hawkshaw, by reason of the terms of the benefit certificate issued to him by the defendant lodge.

The defendant is a corporation organized under the laws of Kentucky, and one of the objects of the corporation is declared to be

the establishment of a "widows and orphans' benefit fund," from which, on satisfactory evidence of the death of a member of the corporation in good standing at the time of his death, and who had complied with its lawful requirements, a sum to be determined by the lodge, not exceeding \$2,000, shall be paid to his family, or as he may direct. The organization consists of the supreme lodge, grand lodges in States, territories, and countries, and subordinate lodges for local work in cities and towns.

William Hawkshaw was, in his lifetime, a member of "The Star of the West" lodge, one of the subordinate lodges of the order, located in the city of Chicago; and in June, 1881, there was issued to him a benefit certificate, by which the defendant agreed on his death, provided he was then in good standing in the order, to pay out of its widows and orphans' fund to his wife, Margaret Hawkshaw, the sum of \$2,000 in accordance with and under the laws governing the order. This widows and orphans' benefit fund of the supreme lodge, the defendant in this case, is derived from the collection of assessments from the members; and one of the provisions of the constitution of the order is that each member shall pay an assessment made on him for this purpose within thirty days from the date of notice to pay the same, "and any member failing to pay such assessment within thirty days shall stand suspended.

It is conceded that this member died on August 19, 1884, and the only question is, whether he was a member of the order in good standing at the time of his death.

It appears from the proofs that on July 6, 1883, Hawkshaw paid assessment No. 121 of \$1.30; that assessment No. 122 of the same amount, became due July 30, 1883, and was not paid by him, but was paid by "The Star of the West" lodge, of which he was a member, pursuant to sec. 7 of art. 8 of the by-laws of said lodge, which provide, "if any member is in arrears with one assessment at the expiration of thirty days, the lodge shall pay the same out of its general fund and attach a fine of twenty-five cents to it, and at the same time notify such delinquent, and he must pay the same assessment and fine within thirty days of such notice; but no more than one assessment shall be paid for each member."

On the 17th of August, 1883, Hawkshaw made default in the payment of assessment No. 123 for the amount of \$1.30, and on the 24th of August, 1883, he was reported to his subordinate lodge as suspended for the non-payment of assessments, and such suspension ordered to be reported to the supreme lodge; and between

July 31, 1883, and at the time of Hawkshaw's death in August, 1884, seventeen or more assessments of \$1.30 were made, none of which were paid by him, or by any one for him. The constitution of this subordinate lodge, "The Star of the West," also provides that any member who has been suspended for non-payment of dues, fines, or assessments, applying to be re-instated, must pay all arrears for dues, assessments, and fines charged at the date of such suspension; but such application for re-instatement must be made within one year; and in case the application for re-instatement is made within thirty days of the time of such suspension no medical certificate shall be required, unless so ordered by the lodge. That is, as I construe the rule (sec. 8 of art. 7), a medical examination and certificate are required, as a matter of course, if application for re-instatement is made after thirty days from the date of suspension; but if made within the thirty days it is in the discretion of the lodge to require such medical examination and certificate. It also appears from the proof that from some time in June, 1883, perhaps as early as April of that year, Hawkshaw was mentally disordered, and at times insane, although no steps were taken to have him adjudged insane until February, 1884; from which, together with the other evidence in the case, I conclude that he was insane at intervals, say from April, 1883, up to the time he was so adjudged in February, 1884.

The records of the Star of the West Lodge show that on October 12, 1883, a motion was made by a member of the lodge to set aside the suspension of Hawkshaw and re-instate him as a member, on the ground that he was insane at the time of the suspension, and was therefore unlawfully suspended. This motion was not entertained by the lodge, for the reason that it was made more than thirty days after the suspension and was not accompanied by a medical certificate. An appeal from this action of the lodge was taken to the grand lodge of Illinois, where the action was affirmed; and this ruling of the grand lodge seems to have been reported to and approved by the supreme lodge, at least no appeal was taken from the grand lodge to the supreme lodge, and the action of the former must, therefore, be held to be final, so far as the action of the order was concerned. Proof was offered tending to show that the motion to re-instate was made at an earlier date, and within thirty days from the time of the suspension, and that, for some reason, this motion was not entered of record; but from all the testimony in the case I have no doubt that the motion of October 12th to re-instate

was the first motion made in the lodge on the subject, and that no earlier motion was brought before them.

While it may possibly be allowable to contradict the records of a voluntary society like this, or show that such records do not fully disclose all the proceedings of a body which ought to be recorded, yet it is clear that proof of that kind must be so convincing and satisfactory as to leave no doubt but that the matter attempted to be interpolated into the records of the proceedings of the body actually occurred. None of the witnesses, by whom it is attempted to prove this alleged earlier effort at re-instatement, speak by any date to strengthen or support their recollection, but simply say they are sure it was less than thirty days after the suspension. Other witnesses are equally certain that they attended all the meetings, and that no such motion was made until that shown by the records. Therefore, I say the proof of this motion within thirty days falls far short of such certainty as should be made in order to entitle it to supply the place of a record entry which had been neglected or omitted in the due course of the business of the body. It appears from the proof that the records of each meeting were read at the next succeeding meeting, and were subject to correction at such succeeding meeting, and it seems to me almost incomprehensible that if a motion of as much interest as this case seems to have excited had been made, and yet not duly entered of record, the omission could have passed the next meeting unnoticed.

But even if such a motion was made, there is no proof of any offer to pay the dues and assessments which were in default at the time of suspension. It is true there is proof of a visit made about the 10th of August, 1883, by Mrs. Hawkshaw to Mr. Stein, who had been reporter or secretary of the lodge, and statement to him of her readiness to pay all assessments; but that proof is wholly immaterial, because it appears that Mr. Stein was not then an officer of the lodge, and had no authority to accept payment of what was then due, and referred Mrs. Hawkshaw to the proper officer of the lodge to make such payments if she wished; but for some reason, she dropped the matter there and made no further attempt at payment, and no payment was made or offered by her to any officer of the lodge who had authority to accept it. So that we have the clearly established fact that Hawkshaw had been suspended from his membership in this order about a year before his death for non-payment of assessments to keep up the very fund out of which the plaintiff now insists she shall be paid; but it is urged that this suspension

was unlawful, because he was insane at the time he made the default for which he was suspended.

There being no provision in the constitution or laws of this organization which declares, either expressly or by implication, that insanity shall be any excuse for default or forfeiture in the paying of assessments, I can see no reason why this case differs in principle on this point from the numerous cases that have been decided by the courts, where insanity, or incapacity from sickness has been urged as a reason why advantage should not be taken of a default in the non-payment of premiums or assessments of life insurance policies, and in that class of cases the rule seems fully sustained that insanity is no excuse for non-payment: *Klein vs. Ins. Co.*, 104 U. S., 88; *Thompson vs. Ins. Co.*, *ibid.*, 252; *Wheeler vs. Life Ins. Co.*, 82 N. Y., 543; *Howell vs. Life Ins. Co.*, 44 N. Y., 276; *Yoe vs. Benefit Association*, 63 Md., 86.

If there is any distinction to be made between these cases and the one now in hand, it would seem to be that this is a stronger case against the beneficiary, because here the jurisdiction of the lodge was invoked to set aside the suspension and re-instate the member, and the lodge denied the relief. Indeed, I think this case might be wholly disposed of on the ground that this being a voluntary society in which the standing of its members and the mode of suspending and re-instating them in their membership was regulated and provided for by the laws of the society, if the records and proceedings of the body show that a member is not in good standing, he must be bound by those records, and the action of his society in that regard, especially when he has exercised his rights of appeal, and the action of which he complains has been affirmed by the appellate tribunal. The society by its own laws being made the judge of the standing of its members, such members are bound by its action on that subject; and I feel very clear that the courts ought not to entertain provisionary supervision over the action of such bodies when dealing with their members, except perhaps when fraud is charged and proven.

It is also urged that as this subordinate lodge has what was called a "sick fund," out of which members who should be sick for a week's time were entitled to be paid \$5 a week for not exceeding thirteen weeks, therefore the subordinate lodge should have applied enough of this "sick fund" to pay this member's assessments to the supreme lodge, so as to keep him in good standing. It is a sufficient answer to this proposition, I think, to say that the subordinate lodge

assumed no such obligation to its members under its constitution or by-laws. It does assume to pay one assessment to save the member from default, and only one; and this must be re-imbursed to his lodge within thirty days after notice of such payment, or he will be in default; and it also provides for payment of fines and dues of a sick member out of his weekly benefits, so as to prevent him from being in arrears to his own lodge while sick; but it does not assume to keep up the assessments made for the widows and orphans' benefit fund, out of which death benefits like this are to be paid. A member may lose his standing in his subordinate lodge by failing to pay his dues and fines to that lodge, and may also lose it by failing to pay the assessments of the supreme lodge for the support of the widows and orphans' benefit fund, but with the payment of assessments to this fund the subordinate lodge has nothing to do except to pay one assessment, and this was done by payment of assessment No. 122, when the lodge's entire duty to this member was performed. The "sick fund" of the subordinate lodge, and the "widows and orphans' benefit fund" of the supreme lodge, are entirely separate, and the subordinate has no right to apply the sick fund to the payment of assessments for the "widows and orphans' benefit fund." Besides this, there is no proof that Mr. Hawkshaw was, at any time prior to his suspension, even in condition to be entitled to the sick benefits. No visiting committee had ever reported him sick, and no benefits had ever been allowed or directed to be paid him. He was at times mentally disordered during the summer of 1873, but was about, and not even alarmingly affected till about the 20th of September, and this attack seems to have been only temporary at that time.

The issues are found for the defendant, and judgment.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUPREME COUNCIL AMERICAN LEGION
OF HONOR

vs.

PERRY AND OTHERS.

HICKS, Ex'r,

vs.

PERRY AND OTHERS.*

A became a member of a co-operative insurance company, incorporated under St. 1877, c. 204, which provided that such corporations might, for the purpose of assisting the widows, orphans, or other dependents of deceased members, provide "for the payment by each member of a fixed sum, to be held by such association until the death of a member occurs, then to be forthwith paid to the person or persons entitled thereto." A named as his beneficiary in his application for membership his wife, to whom the sum named in the certificate issued to him was payable, "subject to such further disposal among the dependents of said A as he might thereafter direct, in compliance with the laws of said corporation." A's wife died before the death of A.

Held, That A could not by will dispose of this money to B, to whom he was engaged to be married, and that such bequest was void and of no effect.

Held, That the fact that B was engaged to be married to A imposed no obligation upon A except to carry out his contract with B, and did not, in any sense, by itself, make her dependent upon him, and that she did not come within the class of persons which, if able, he was bound by law to support.

Where the by-laws of a co-operative insurance company provided that, in the event of the death of all the beneficiaries selected by a member, before his decease, if no other further disposition thereof be made, the benefit shall be paid to the dependent heirs of the deceased member, and the member dispose of the benefit, such disposition being rendered null and void by

* Opinion filed, January 11, 1886.—From *N. E. Reporter*.

the statute, *held*, that the mother of the member, his sole heir at law, and dependent upon him, was entitled to receive said benefit.

A was a member of a co-operative insurance company, and by the terms of the certificate issued to A, the sum of \$2,000 was to be paid to B, the wife of A, the person named in his application, or to such person or persons as he should subsequently direct by will, or otherwise, etc. B died before A, and the latter designated C, in his will, as the beneficiary under the certificate. Before the death of A, but after the issuing of the certificate, the by-laws of the company were amended, providing that the fund should be paid "to the widow and the children of the deceased, and, if none, then to the father, mother, sisters, and brothers, share and share alike, or he may name a party at the time he becomes a member, to whom the money shall be paid at his death," etc. St. 1882, c. 192, § 2, added to the class, after the word "orphans," the words "or other relatives of deceased members." The by-laws creating the new class of beneficiaries were not enacted after the statute of 1882 took effect.

Held, That C was not entitled to the benefit fund; and that a sister of A, with whom he resided, was not entitled to the fund unless she was dependent upon him for support.

Where certain real estate and personal property of a deceased person is to be disposed of, it is the function of the probate court to adjudge as to the distribution, and the superior court cannot make a decree determining what shall be done by the probate court.

B. F. BRACKETT and **C. H. POOR**, for Augusta F. Wallace.

S. A. ABBOTT and **S. H. PEARL**, for administrator of Betsey Perry, for administrator of estate of Emily A. Morse and Lydia M. Perry.

GARDNER, J.

The plaintiff in the first case is a corporation organized for the purpose of co-operative insurance, belonging to that class of corporations mentioned in Pub. St., c. 115, §§ 9, 10, and St. 1882, c. 195. From the report of facts it is evident that the plaintiff must have organized under St. 1877, c. 204, which provides that certain associations, of which the plaintiff is one, "may, for the purpose of assisting the widows, orphans, or other dependents of deceased members, provide in their by-laws for the payment by each member of a fixed sum, to be held by such associations until the death of a member occurs, then to be forthwith paid to the person or persons entitled thereto." This is substantially the same as section 8, Pub. St., c. 115. The plaintiff made certain by-laws, after which Samuel B. Perry became a member. He named as his beneficiary in his application for membership his wife, Carrie E. Perry. By the terms of the certificate issued to him by the plaintiff, \$1,000 was made payable to his wife, "subject to such further disposal among the dependents of said Samuel as he might thereafter direct, in compliance with the laws of said corporation." Carrie E. Perry died before her husband. He died in September, 1882, leaving a will and codicil, and being at the time of his decease engaged to be

married to the defendant Augusta F. Wallace, to whom he bequeathed said \$1,000.

1. The first question raised is whether Samuel B. Perry could dispose of this money by will. The statute under which the plaintiff is organized gives it authority to provide for the widow, orphans, or other dependents upon deceased members, and provides that such fund shall not be liable to attachment. The class of persons to be benefited is designated, and the corporation has no authority to create a fund for other persons than the class named. The corporation has power to raise a fund payable to one of the classes named in the statute, to set it apart to await the death of the member, and then to pay it over to the person or persons of the class named in the statute, selected and appointed by the member during his life, and, if no one is so selected, it is still payable to one of the classes named. The claim that the fund is subject to disposition by will appears to be contrary to the scheme projected by the statute. If the fund were subject to testamentary bequest, then, upon the decease of the member, it might go into the hands of his executor or the administrator of his estate, and become assets thereof, liable to be swallowed up by the creditors: *Johnson vs. Ames*, 11 Pick., 173, 181; *Osgood vs. Foster*, 5 Allen, 560.

If there were no creditors, the member by his will could divert it from the three classes named in the statute. In either case, this would defeat the purpose for which the fund was raised and held, and would be in direct conflict with the object of the statute for which the association was formed, and would set aside the contract entered into between the member and the corporation. In determining this question, it is the duty of the court to construe the statute liberally, and in such a manner as to carry out the benevolent purpose sought to be provided for, and in no event, unless absolutely required by its language, to construe it so as to defeat such purpose. We think, therefore, that Samuel B. Perry was not empowered to bequeath the fund by his last will and testament, and that the bequest of the same to Augusta F. Wallace is void, and of no effect: *Kentucky Ins. Co. vs. Miller*, 13 Bush., 489; *McClure vs. Johnson*, 56 Iowa, 620; s. c., 10 N. W. Rep., 217.

The defendant Augusta F. Wallace contends that, if she is not entitled to this fund under the will of Samuel B. Perry, she comes within the class of persons designated as "dependents" upon said Samuel, and should therefore be its recipient. At the time of the

decease of Samuel B. Perry, "a valid engagement of marriage subsisted between him and the defendant Augusta," and by reason of this she claims to be dependent upon him. Until they became man and wife by marriage, there was no obligation upon Samuel to support or provide for her. She does not come within the class of persons which, if able, he was bound by law to support. Pub. St., c. 84, § 6. The mere engagement to marry imposed no obligation upon him except to carry out his contract with her. Their mutual promise to marry did not in any sense, by itself, make her dependent on him. In *Ballou vs. Gile*, under similar by-laws to those of the plaintiff association, the court said: "We think the true meaning of the word 'dependent' in this connection, means some person or persons dependent for support in some way upon the deceased." If this interpretation is correct, then it is a question of fact, and not of law, to determine whether Augusta was dependent upon Samuel. If it is not correct, the superior court assumed the question to be one of fact, and so passed upon it. As matter of law, it is clear, upon the facts stated in the report, that Augusta was not dependent upon Samuel, as that term is used in the statute. The superior court having passed upon the question of fact, and found that she was not dependent upon him, we are bound by this decision, and cannot review it. As the plaintiff's by-laws provide that, in the event of the death of all of the beneficiaries selected by the member, before his decease, if no other or further disposition thereof be made, the benefit shall be paid to the dependent heirs of the deceased member; and as it appears by the report that the judge found, as matter of fact, that the defendant Betsey Perry, the mother of Samuel B. Perry, at the time of his death, was a widow, his sole heir at law, and dependent upon him; and inasmuch as the above provision in said by-law is in conformity to the statute,—the decree of the superior court must be affirmed.

The second case, in many respects, is similar to the one we have been considering. The association known as the Knights of Pythias was organized under the statutes, before September, 1879. One of the certificates of membership, granted to Samuel B. Perry in September, 1879, by the association, sets out that, "in consideration of the representations and declarations made in his application, which is made part of the contract, and the payment of the prescribed fee, and in consideration of the payment hereafter to said endowment rank of all assessments as required, and the full compliance with all the laws governing the rank, now in force, or that hereafter

may be enacted, two thousand dollars will be paid by the" said association "to Carrie E. Perry, as directed by said brother in his application, or to such person or persons as he may subsequently direct by will or otherwise, and entered upon the records of the supreme master of exchequer," upon the proof of death and the surrender of this certificate. The wife, Carrie, died before her husband, and he made no designation of any other beneficiary to receive the fund, except as contained in his last will. Before Perry died but after the issuing of said certificate to him, the corporation made certain by-laws, relating to the payment of benefit funds upon the death of a member, viz.: that the fund should be paid to the widow and children of the deceased, and, if none, then to the father, mother, sisters, and brothers, share and share alike; or he may name a party at the time he becomes a member, to whom the money shall be paid at his death. If none of said persons are alive, then after payment of the funeral expenses of deceased member, it shall be paid into the widows and orphans' fund. St. 1882, c. 195, § 1, added to the classes, after the word "orphans," the following: "other relatives of deceased members." Augusta F. Wallace, one of the defendants in the original bill, claimed these funds under the will of Samuel B. Perry.

In this case the contract contemplated the making a will by Samuel. But independently of the contract the member could not make a testamentary disposition of these funds, as we have shown. The will of Samuel, although it purported to bequeath these funds, did not in fact accomplish it. In this respect the will was void. The defendant Augusta also claims that she was dependent upon Samuel. The superior court, as the report shows, found, as matter of fact, that she was not dependent upon him, and we have decided in the previous case that, as matter of law, the facts do not warrant us in determining that she was dependent upon him. Lydia Perry, one of the defendants, claims that she is entitled to part of these funds under the last will of Samuel. We have already passed upon this claim. She also asserts that she was within the class of persons designated by St. 1877, c. 204, and 1882, c. 195, to whom such benefit funds were payable, because she was the sister of Samuel. It is clear that sisters were not within any of the classes named in the statutes, prior to that of 1882, which was approved May 1, 1882. She would be included under this last statute, among the "other relatives of deceased members" therein mentioned. But this statute (passed in 1882), which mentioned widows, orphans

or other dependents of deceased members as the only recipients of these funds, and could not deprive the person entitled to the funds thereby from possession of the same, could not affect the contract entered into under the statute of 1877. Before the statute of 1882 took effect, the statute of 1877 was in force, and the association formed under it could create funds only for the benefit of those classes named therein, and to those belonging to those classes alone could the benefit funds be paid. If the plaintiff corporation undertook to make by-laws in contravention of the statute, they were ultra vires, and of no effect: *Briggs vs. Earl*, 139 Mass., 473; s. c., 1 N. E. Rep., 847. It was a question of fact to determine whether the by-laws of the corporation including sisters of the deceased members, as a class, to receive the funds under certain conditions, were enacted after the amendment contained in the statute of 1882 took effect as law, and before the death of Samuel in September, 1882. The superior court has settled the fact, in effect, by the final decree passed therein, that the by-laws creating the new class of beneficiaries were not enacted after the statute of 1882 took effect. The facts relating to this matter are not reported.

From the time of the death of Carrie E. Perry to that of Samuel, the report finds that he resided with the defendant Emily A. Morse; and "that she depended upon him to support her, if he was able, and she was in need." She had no property except real estate, valued at about \$1,400, and furniture worth about \$300. We cannot determine from the report that she was dependent upon him, or that she was ever in need. This may depend upon many circumstances. By the decree of the superior court it must have been found by the judge that she was not dependent upon him. This was a question of fact, to be determined by the superior court at the trial, and it is apparent that it was there determined in the negative.

This disposes of all the questions argued by the three defendants, Wallace, Lydia A. Perry, and the administrator of Emily A. Morse.

By the will of Samuel B. Perry, he gave various articles of personal property to several of the defendants, and at the time of his decease he left certain real estate. The superior court has incorporated in its decree the following: "That the real estate mentioned in the original suit should be sold, and the proceeds thereof applied to the payment of the debts, funeral expenses, and charges of administration mentioned in said bill." Although all the parties to these proceedings have considered this decree as within the power and jurisdiction of the superior court, yet we think that this belongs ex-

clusively to the probate court, to be there considered and passed upon. This decree is in effect an order determining what the probate court should adjudge under the facts stated. This cannot be done by the superior court. The cross-bill proceeds upon the ground that the executor of estate of Samuel B. Perry received these funds, amounting to \$3,000, not as assets of the estate, but in trust, to pay the same over to the person entitled to receive them; that they were wrongfully paid to him; and that he does not hold them as the executor of Perry. So far as the decree of the superior court relates to this sum, we think it should be affirmed. Decree accordingly.

CIRCUIT COURT OF THE UNITED STATES.

EASTERN DISTRICT OF MICHIGAN.

CAFFERY

vs.

JOHN HANCOCK MUT. LIFE INS. CO. }

An act of the legislature provided that, upon the payment of the first premium upon a policy of life insurance, the policy should remain in force for a certain time for the full amount thereof, "anything in the policy to the contrary notwithstanding."

Held, That this act might be waived by the express agreement of the parties, by the substitution of a non-forfeitable policy of a different character.

The beneficiary of a policy is bound by all the terms of the original contract entered into between the insured and the company.

This is an action upon a policy of life insurance for \$1,000. The facts were all stipulated, and were substantially as follows:—

(1) The defendant is a corporation, organized and existing under the laws of the State of Massachusetts prior to the dates of any of the statutes of the State hereinafter mentioned.

(2) On the fifteenth day of November, 1880, one John F. Mills, of Michigan, made his written and printed application to the defendant for insurance on his life for \$1,000, for the term of twenty-year endowment, and in said application agreed as follows, to wit:—

In consideration of the agreement of said company that the policy to be issued on this application, if accepted, shall not be forfeited for non-payment of any premium, but in case of failure to pay any premium shall become a paid-up policy for an amount proportional to the premium paid, it is hereby agreed that every person accepting or acquiring any interest in said policy waives the benefit of chapter 186 of the laws of 1861 of the commonwealth of Massachusetts, if it should be held that said chapter applies thereto; and

* Decision rendered, March 15th, 1886.—From *Federal Reporter*.

agrees that said chapter shall constitute no part of said policy, and will accept said provision for a paid-up policy in lieu of the provisions of said chapter.

(3) after the execution and delivery of said application by said Mills to the defendant, on December 4, 1880, it issued to him its policy of insurance, whereby, in consideration of the premium of \$47.98, to be paid on or before December 4th, in every year, it promised to pay \$1,000 to said Mills twenty years from date, or, in case of his prior decease, to his sister, the plaintiff, sixty days after due notice and proof his death, deducting the premium, if any, for the balance of the policy year. It was further provided in said policy as follows:—

After one or more premiums shall have been paid, this policy shall not become forfeited or void by the non-payment of any subsequent premium, but shall remain in force for an amount pro rata to the number of premiums paid, to wit, for one-twentieth of the amount insured for each and every premium paid. This contract is made and to be performed in the commonwealth of Massachusetts.

(4) After the payment of the first premium, and the failure to pay the second, and on the 27th day of October, A. D. 1882, the insured died, and due notice and proof were made. The policy was then in force to the full amount if chapter 186 hereinafter mentioned applied thereto. Thereupon the plaintiff claimed the application of the statute of 1861, c. 186, and demanded the full amount of insurance, \$1,000; but the defendant contended that chapter 186 of the Laws of 1861 did not apply to said policy; or, if it did, that by reason of the waiver of the statute, and the agreement by the insured to accept the provision made for a paid-up policy for an amount ratably proportional to the number of premiums paid, to wit, one-twentieth of \$1,000 for each premium paid, the plaintiff was entitled to receive \$50, which it offered to pay the plaintiff.

(5) Judgment is to be rendered for the plaintiff for \$50, without costs or interest, in case the court sustains the contention of the defendant; and for \$1,000, and interest from December 27, 1882, and costs, in case the court sustains the contention of the plaintiff.

A jury was waived.

CHAS. A. KENT, *for Plaintiff.*

ALFRED RUSSELL, *for Defendant.*

BROWN, J.

The question as to the applicability of the statute, and as to whether it was waived by the provisions of this policy. The statute of Massachusetts, passed in 1861, to which the policy was made su-

that no policy of insurance hereafter issued by any entered by the authority of the commonwealth shall or be forfeited by the non-payment of the premium. There follows a provision that the first premium shall at is called a temporary insurance; and if the statute e policy, the plaintiff, as appears by the stipulation, was amount of \$1,000, the full amount of the policy, for rs after the payment of the first premium. When he d have been entitled to receive the full amount of the gh after the expiration of what is called the temporary policy would become absolutely void. The second chapter provides that if the death of the party occur rm of the temporary insurance covered by the value of no condition shall have been violated by the insured, shall be bound to pay the amount of the policy the h there had been no lapse of the premium, "anything to the contrary notwithstanding."

instead of being issued in the ordinary form, provided upon the payment of the premium the policy should be e, and should stand good for that portion of the sum e the premium represented. The policy having been a ndowment policy, and the first premium having been ued good for \$50, or one-twentieth of the amount

f insists that this provision of the statute could not be hat as the period of the temporary insurance provided expired, she is entitled to recover the entire amount of The vital question, then, is whether it was competent s to waive the provision of the statute in express terms. doubt that the statute was intended to apply to all thing to the contrary notwithstanding, as the statute ; and that if the policy had been an ordinary one the ave been entitled to the whole sum insured. It is whether the policy actually issued was not a more bene- the insured than the one provided for by the statute; temporary insurance had expired, the policy, by the ne void, and nothing could be recovered upon it, first premium had been paid; but under the stipulation it did not become void, but only became a policy for amount of the sum insured; that is, in this case, for . In this particular case it operates unfortunately for

the insured, because having died while the temporary insurance was still in force he would, under the statute, be entitled to the entire sum insured, whereas under this policy, as already stated, he would be only entitled to one-twentieth of this amount.

The question, then, is whether it was competent for the parties to waive the provisions of the statute. It is objected by the plaintiff that the statute must apply, first, because the pleadings set up no such agreement, and hence none is admissible. In this connection she relies upon the seventeenth rule of the circuit court, which provides that "in case the company or person issuing such policy shall rely, in whole or in part, upon the failure of the plaintiff to perform or make good any promise, representation, or warranty not contained in such policy, but set forth in any other paper or instrument in the hands of said insurer, the notice under the general issue shall declare the same, and indicate the breach relied on." We are clearly of the opinion this rule does not apply to this case, as the defendant offers the application, not for the purpose of showing that the plaintiff has been guilty of a breach of warranty, but to prove what the contract actually was. In such case the general rule applies that all papers executed at or about the same time are admissible to show the whole agreement between the parties. The parties are not limited to any one agreement under the rule, but all contemporary documents may be admitted to show the entire agreement.

Second. That the application in question is no part of the contract sued upon, as it is in no way referred to in the policy. This objection is covered by the remark already made that all contemporaneous papers are admissible to show the contract between the parties.

Third. That it cannot bind Mrs. Caffery, who never heard of it, and whose rights were fixed at the time the policy issued. We understand the rule to be that when the policy has once issued and taken effect, no agreement can be entered into between the insurance company and the person whose life is insured to the detriment of the beneficiary under the policy, but that the beneficiary is bound by the contract entered into between the assured and the company. While she cannot be prejudiced by subsequent agreements, she is bound by whatever covenant or agreement was entered into at the time the policy was issued.

Fourth. The law was for the benefit of the insured, and by its very terms the insured could not waive this benefit. The insurer must pay the loss if the policy was in force as provided by the statute, anything in the policy to the contrary notwithstanding. We think,

however, that a party may waive the benefit of this statute. The words "anything in the policy to the contrary notwithstanding," in our opinion, were intended to apply to the ordinary forms of policies, which provide that there shall be a forfeiture if the premium be not promptly paid; but if the parties choose to adopt any other form of policy which shall be non-forfeitable, we think it within their power to agree that this form shall be substituted for the statutory form, and that the statute may thus be waived by the express agreement of the parties.

This question came before Mr. Justice Clifford in the case of *Desmazes vs. Mutual Ben. Life Ins. Co.*, 7 Ins. Law J., 926. Desmazes, the husband of the plaintiff, died in 1876, after payment of the first premium and part of the second, and due notice and proof of his death were given by the plaintiff to the defendant. No further payment of premium was made by the plaintiff. Except paying the premium, all conditions of the policy were fulfilled by the plaintiff. The court said:—

The parties agree that if the court shall hold that the Massachusetts statute of 1861, c. 186, applies to the contract made between the plaintiff and the defendants, then judgment shall be rendered in favor of the plaintiff for the sum of \$925, with interest; otherwise the judgment shall be for the plaintiff in the sum of \$85.98, with interest from the same date. * * * Nothing is contained in the statute to indicate that the legislature intended to withdraw the clear right which the insured had, outside the statute, to waive the non-forfeiture provision if the other party consented, and to accept a different stipulation, of a more favorable character, in lieu of the same. * * * By the express terms of the contract, the insured was at liberty to omit paying the premiums at the times and place mentioned in the policy, and in that event the policy did not become forfeited or void, but became a paid-up policy for the amount, proportioned to the premiums previously paid. Fifty dollars it is stipulated shall be paid in that event for every annual premium previously paid in fulfillment of the contract between the parties, which, as the plaintiff contends, tends strongly to show that the policy did not become forfeited, and the case does not fall within the said Massachusetts statute. * * * Cases often arise where a party is at liberty to waive statutory provisions in his favor, and Mr. Sedgwick lays it down, as a general rule, that where no principal of public policy is violated, parties may waive the provisions of a statute which, if fulfilled, would operate in their favor, and that proposition is fully sustained by many other authorities. * * * When the parties undertake in the policy itself to declare the meaning and effect to be given to its stipulations, they have a right to do so, except in cases where there is some provision in the statute to indicate an intention on the part of the legislature to control the action of the parties in that respect. There is nothing of the kind contained in the original act referred to, as it is plain that its terms do not apply to any other than Massachusetts corporations.

The court held that the provisions of the statute might be waived.

We think it a strong authority for the proposition contended for, although the case went off upon the ground that the act only applied to Massachusetts corporations.

The case of *Farmers & Drovers' Ins. Co. vs. Curry* (13 Bush, 312) also holds that the statute providing that "all statements and descriptions in any application for the policy of insurance shall be deemed and held representations and not warranties," does not prevent parties from contracting that such statements and descriptions shall be considered part of the contract, and warranties by the assured, and that any false representations by the assured of the condition, situation, or occupation of the property shall render the policy void. The case holds, substantially, that a statutory provision of that kind may be waived. That this was also the construction given to the statute by the Massachusetts legislature is evident from the subsequent acts of 1881, c. 63, § 1, and 1882, c. 119, § 161, in both of which it was expressly provided that any waiver by the assured of the benefits of the act should be void. If the legislature had considered that the provisions of the prior act could not be waived, this clause would be entirely nugatory.

It is further claimed by the plaintiff that the letter of the State agent to the assured estops the company from disputing the fact that the policy had not lapsed. But the policy expressly provides that no person except the president or secretary is authorized to make or waive contracts. The agent had no authority to put a construction upon this contract different from that which the law puts upon it.

Upon the whole, we have come to the conclusion that the plaintiff is entitled to a judgment for \$50, without costs, and as there was no tender made of the amount, no costs can be awarded to the defendant.

SUPREME COURT OF INDIANA.

Appeal from the Jefferson Circuit Court.

PHENIX INS. CO.

vs.

DAVID ALLEN, JR., AND OTHERS.*

The insured signed an application which was blank as to the location of the property, and the location was afterwards, as alleged, incorrectly filled in by the agent. The policy corresponded with the application, and the mistake was not discovered until after the loss.

Held, That insured was entitled to aver the alleged misdescription in his complaint and to prove without asking a reformation. The act being that of the agent, the company was estopped from setting up the misdescription as a defense.

NIBLACK, J.

This was an action by David Allen, Jr., and Frank Allen against the Phenix Insurance Company of Brooklyn, in the State of New York, upon a policy of insurance issued upon a lot of hay and other property, both real and personal and situate in Switzerland County.

The action was commenced in the Switzerland Circuit Court, but the venue was afterward changed to the court below.

The complaint was in three paragraphs. The first and third paragraphs counted upon the policy of insurance, alleging the loss of the hay and some other personal property by fire.

The second paragraph was in form a complaint upon the policy of insurance, but alleged a mistake in its execution, and asks a reformation in accordance with what was claimed to have been the true intention of the parties. This paragraph was held to be an

* Decision rendered, January 25, 1887.

equitable proceeding and triable by the court alone. Demurrers to each paragraph of the complaint were severally overruled.

The first and third paragraphs were submitted to a jury for trial.

After the evidence was concluded, the circuit court instructed the jury to return a verdict for the defendant on the first paragraph, which they accordingly did. But upon the third paragraph the verdict was for the plaintiffs, and they had judgment on the verdict.

Error is assigned upon the overruling of the demurrer to the third paragraph of the complaint and upon the refusal of the circuit court to grant a new trial.

The third paragraph of the complaint charged that the plaintiffs were, on the 9th day of May, 1884, the owners of a forty-acre tract of land in section five (5), in township two (2) north, of range three (3) west, on which had been erected and were standing, a one-story, shingle-roof, frame and log dwelling-house, and a shingle-roof, frame granary; that on the same day the plaintiffs were, as lessees, occupying and cultivating a tract of land containing one hundred and eighty-four acres in section ten (10) in the same township and range belonging to another person; that at the same time the plaintiffs were the owners of twenty-five tons of hay, two horses, and a considerable amount of other specifically described personal property, situate and kept in a barn located on said leased tract of land in said section ten (10); that on said 9th day of May, 1884, one Clifford Fish, who was the agent of the defendant, visited the plaintiff at said barn on said section ten (10), and proposed that the defendant would issue to them a policy of insurance against loss by fire and lightning on their said destructible property, which he then saw and examined, for the aggregate sum of \$760, to run from the first day of May, 1884, for the term of five years; such policy of insurance to be issued in consideration of the sum of \$11.50, for which the plaintiffs might execute their promissory note payable on the first day of May, 1885; that the plaintiffs accepted the offer thus made to them, and executed to the defendant their promissory note for \$11.50, payable on said first day of May, 1885, and signed an application for a policy of insurance to be issued in accordance with the agreement which had been entered into concerning the same; that said application, when it was signed and delivered to the said Fish, was blank as to the location of the property on which the policy of insurance was to be issued; that in this blank condition the said Fish delivered the application to one Adison Works, of the city of Vevay, who was the local agent of the defendant for the county

of Switzerland; that the said Works without the knowledge or consent of the plaintiffs, filled up the blank in said application so as to make it appear that the personal property as well as the buildings to be included in the policy of insurance, was situate upon their forty-acre tract of land, in section five (5) herein above referred to; that, with the blank so filled up, the said Works transmitted such application to the defendant's office, in the city of Chicago, in the State of Illinois; that the defendant thereupon issued to the plaintiffs a policy of insurance upon the property mentioned in the application, in accordance with the original agreement with Fish, except that the personal property was erroneously described therein as situate in section five (5) instead of in section ten (10),—following in that respect, the description of it given by the said Works as it was by him wrongfully written into the application; that the personal property covered by said policy of insurance except the two horses, being at the time situate upon the said section ten (10), as the said Fish well knew, was on the twentieth day of November, 1884, destroyed by fire, of which the defendant was duly notified; that the plaintiffs did not know until after the greater part of the property insured was so destroyed by fire that such property was described in the policy of insurance as situate upon section five (5), as herein above set forth.

It is claimed that this paragraph of the complaint was bad upon demurrer, upon the ground that it was a complaint, in part, upon a written contract, and in part upon a parol contract, which latter contract had been merged into and superseded by the written contract; also upon the ground that it rested the right of the plaintiffs to recover upon extrinsic facts to be proven by parol evidence varying and contradicting the alleged written contract of insurance.

No rule of law is more firmly established than the one which declares that a parol agreement is merged in and superseded by a subsequent written agreement embracing the same subject-matter. It is equally well settled, as a general rule, that parol evidence is inadmissible to either vary or contradict a written instrument.

It is also true that the locality in which goods are kept is an important element in a contract of insurance, and that ordinarily it must be made to appear that the property was at the place designated in the policy when it was destroyed: 1 Wood Fire Ins., sec. 47.

But no one of these rules is applicable to the case made by the paragraph of the complaint under consideration. The averments of this paragraph, were to the effect that the words on the face of the

application, which gave a false description of the location of the personal property afterwards destroyed by fire, and which caused a misdescription of such location to be inserted in the policy of insurance, were written into the application by an agent of the defendant, without the knowledge or consent of the plaintiffs, and hence never became a part of the application which the plaintiffs signed, and for which they were in any manner responsible. If this misdescription of the location of the personal property was so written into the application without the knowledge or consent of the plaintiffs, it was a fact which they were entitled to aver in their complaint, and to prove at the trial without asking a reformation either of the application or of the policy of insurance issued upon it. The writing into the application the alleged misdescription in question by the defendant's agent, without the knowledge or consent of the plaintiffs, estopped the defendant from setting up such misdescription as a defense to the action. These general principles governing actions on policies of insurance are well recognized by numerous authorities: 1 *Wood Fire Ins.*, sec. 49; *May Ins.*, sec. 141; *Amer. Cent. Ins. Co. vs McLanathan*, 11 *Kans.*, 533; *Lynchburg Fire Ins. Co. vs. West*, 76 *Va.*, 575; *Combs vs. Hannibal Ins. Co.*, 43 *Mo.*, 148; *Planters' Ins. Co. vs. Meyers*, 55 *Miss.*, 479; *Planters' Ins. Co. vs. Sorrels*, 1 *Bart.*, 352; *Woodbury Savings Bank vs. Charter Oak Ins. Co.*, 31 *Conn.*, 517; *Carpenter vs. Providence Washington Ins. Co.*, 2 *Am. Lead. Cases* 865, 16 *Pet.*, 495 (41 *V. S.*, Bk. 10., L. ed., 1044); *Rowley vs. Empire Ins. Co.*, 36 *N. Y.*, 550; *Plumb vs. Cattaraugus Co. M. Ins. Co.*, 18 *N. Y.*, 392; *Insurance Co vs. Wilkinson*, 13 *Wall*, 222 (80 *U. S.*, bk. 20, L. ed., 617).

Evidence was introduced, and instructions to the jury were given and refused, and the cause was in all respects tried in accordance with the general principles governing actions on policies of insurance above enunciated. There was also evidence tending to sustain the verdict, and hence no sufficient reason has been shown for a reversal of the judgment. See *North British & Mercantile Ins. Co. vs. Crutchfield*, Ind. S. C., Jan., 1887.

Judgment is affirmed with costs.

SUPREME COURT OF INDIANA.

Appeal from the Marion County Superior Court.

MASONIC MUTUAL BENEFIT ASSOCIATION

vs.

MARY BURKHART.*

In case of benefit societies the original beneficiaries named in the certificate may be changed with the consent of the insured and the society in Indiana. The beneficiary acquires no vested rights until the death of the member. In this respect such an association differs from an ordinary life company. The consent of the beneficiary is not necessary to such a change.

MITCHELL J.

This suit was brought by Mary Burkhart, to recover on a certificate of membership issued by the Masonic Mutual Benefit Society of Indiana, to Michael Burkhart. It appears from the averments in the complaint that the society is a domestic corporation, organized under the laws of this State. It is described as a charitable organization for the mutual benefit of its members. A copy of the certificate is set out in the complaint. The certificate shows that the benefits to accrue from the membership thereby created were to be payable to Mary Burkhart, wife of Michael Burkhart, or to the legal representatives of the latter. The complaint avers that on the twenty-first day of February, 1883, by an arrangement between Michael Burkhart and the society, the original certificate was canceled and surrendered up, and a new certificate taken in its stead. Under the substituted certificate, the benefits were to become payable to

* Decision rendered, January 26, 1887.

Michael Burkhart, Jr., a son of Michael Burkhart, the insured. It is alleged that the cancellation of the original, and the substitution of the new certificate in its stead, were both without the knowledge or consent of the plaintiff. Payment of all dues is alleged, and it is averred that Michael Burkhart died a member of the society. It is further alleged that an assessment, according to the terms of the certificate and the rules of the society at the time of the death of Michael Burkhart, would have produced \$2,500, and that that amount was paid over to Michael Burkhart, Jr., on the substituted certificate, without the plaintiff's knowledge or consent. Judgment is demanded for the sum so paid.

The question is, do the facts set forth in the complaint constitute a cause of action? On behalf of the appellant, it is argued, in effect, that a designated beneficiary in a certificate of membership of a society organized for charitable purposes, or for the mutual benefit of its members, may be changed, subject to the organic law and the regulations of the society; and that, as it appears from the averments in the complaint that a change was actually made by the society and the member to whom the certificate sued on was issued, it must be presumed that the change was made in consonance with duly adopted rules and regulations of the society, and the law then in force.

That beneficiaries may be changed in cases of policies or certificates of membership issued by societies such as the one here concerned is settled by the decisions, as well as by statute, in this State: Section 3,850, Rev. St., 1881; *Presbyterian etc. Fund vs. Allen*, 106 Ind., 593, and cases cited. In this respect the rules governing policies issued by ordinary insurance companies are not controlling when applied to certificates of membership in an association such as that here involved. By becoming a member of such a society, the holder of a certificate acquires the power of appointment, in respect to the fund to be accumulated and paid at his death. Compliance by the member with the conditions of membership entitles the beneficiary appointed to receive the benefits provided by the certificate and rules of the society. This power of appointment is to be exercised in conformity with the rules and regulations of the association, and the law under which it has its existence. The rights and liabilities of the members are fixed by such rules and regulations as enter into the constitution of the company, as provisions of its charter and by-laws such rules as become part of the law governing the association.

In the act of March 2, 1879, in relation to beneficiary societies, it is provided, among other things, that "all such benefits, claims, or interest, made for the benefit and protection of the wife, child, or children, or dependents of parties so insured, or members of such society so organized and incorporated, shall be for the sole use and benefit of the parties named as beneficiaries in the policy or certificate of membership issued by such society." Section 3,850 enacts substantially, that such certificates of memberships shall be regarded as a contract between the member and the society, and authorizes the association to change the name of the beneficiary named in such certificate on such terms and conditions as may be agreed to by the parties to the contract. Upon the enactment of this statute its provisions became part of the charter or constitution of the company. Thenceforth all concerned were bound to take notice that a change in the name of a beneficiary, in a certificate issued by an association such as the appellant, might be made by the association and the member, upon such terms and conditions as might be agreed upon.

The complaint avers that Michael Purkhart procured the society, in which he held a certificate of membership, to change the name of the beneficiary from Mary Burkhart to Michael Burkhart, Jr., on the 21st day of February, 1883. Thereupon the certificate sued on was canceled and surrendered up. This was in strict accord with the power conferred upon the society and the member by the statute above referred to. The general rule applicable to beneficiary or charitable associations is that the beneficiary acquires no vested rights to the benefits which are to accrue upon the death of a member until the death of the member occurs. During his lifetime the member may therefore exercise the power of appointment, without other limits or restrictions except such as are imposed by the organic law, or by rules and regulations of the society duly adopted in compliance therewith: *Splovn vs. Chew*, 60 Tex., 532; *Aid Association vs. Lewis*, 9 Mo. App., 412. *Ballou vs. Giles*, 50 Wis., 614.

The essential difference between a certificate of membership in a beneficiary association and an ordinary life policy is that in the latter the rights of the beneficiary are fixed by the terms of the policy, while in the former they depend upon the certificate and the rights of the member under the constitution and by-laws of the society. In the one case the rights of the beneficiary are fixed and vested from the moment the policy takes effect; in the other they are subject to such changes as the law of the association authorizes

the member to make. All that a beneficiary has during the lifetime of the member, owing to his rights of revocation, is a mere expectancy, dependant upon the will and pleasure of the holder of the certificate. This expectancy is not property: *Durian vs. Central Verein*, 7 Daly, 168; *Tennessee Lodge vs. Ladd*, 5 Lea., 716; *Swift vs. Benefit Ass'n*, 95 Ill., 309.

The act of 1877, which became part of the fundamental law of the society, imposed no limit upon the choice which the member or certificate-holder might make, except that the change of beneficiaries should be upon such terms and conditions as the member and the association should agree to. The complaint avers that a change was agreed upon. It is assumed, however, because the change was agreed to, and made without the original appointee's consent, that it did not affect her right to recover. This assumption is erroneous. The law did not require her consent. As she had no vested interest in the fund to be accumulated and paid upon the death of her husband—nothing but a mere expectancy—the law affected certificates issued before it took effect the same as those subsequently issued. Having seen that the law in force at the time the change was made expressly authorized the change to be made, we must presume that the change was made in the manner provided by law, and by the rules and regulations of the society made in conformity therewith: *Presbyterian, etc. Fund vs. Allen*, *supra*; *Hecks vs. Perry*, 140 Mass., 580.

If any rule or regulation of the society, which it had the power under the law to adopt, in respect to the terms and conditions of such change, has been violated in making the change, it became necessary for the plaintiff, suing on a changed certificate, to aver and prove the fact.

The demurrer to the complaint should have been sustained. Judgment reversed, with costs.

SUPREME COURT OF MINNESOTA.

PHOENIX INS. CO.

vs.

PRATT AND ANOTHER.*

Local insurance agents are liable for losses arising from negligent omissions on their part, in departing from instructions of their superiors in the management of the trust committed to them.

Where a local agent received instructions from a State agent of the company (whose authority included the supervision of risks taken by the local agents, and the power to order the cancellation of the same) desiring him "to relieve the company" of a certain risk "as soon as possible," which the local agent failed to do, but, instead, answered by letter requesting "that the policy might run to expiration," which would occur a few days later, and stating that it would be an accommodation to him to allow it to so run, and thereafter, within four days, the insured property was burned, before opportunity for reply, held sufficient evidence that he understood the instructions of his superior to be a direction to cancel, and a recognition of the authority of the latter to so order.

Lusk & Bunn, for Phoenix Ins. Co., *Appellant*.

Hammons & Hammons, for Pratt and another, *Respondents*.

VANDERBURGH, J

The defendants were local agents for the plaintiff in the city of Anoka, conducting insurance business in its behalf from June, 1881, until some time after March 4, 1885. They had also been engaged in a general insurance business for many years before. In April, 1883, the defendants, as such agents, issued a policy in behalf of plaintiff, to the First National Bank of Anoka upon the Anoka City Mill for one year, which was thereafter renewed from year to year, and was in force in March, 1885, when the mill was burned. In July, 1884, the plaintiff appointed one Otto Greeley

* Decision rendered, February 11, 1887.

special State agent and adjuster for the company in Minnesota, and duly notified the defendants of such appointment. His duties were not specially mentioned or defined in his commission, or in the notice to defendants, but the evidence shows that they were generally known and recognized among insurance agents, and, in addition to the adjustment of losses, consist chiefly in the supervision of the business of and risks taken by the local agents of the company, including the renewal and cancellation of policies.

This action is brought against the defendants to recover damages for their alleged neglect to cancel the policy in question, in pursuance of instructions of Greely given before the fire. The defendants admit and testify that on the twenty-eighth day of February, 1885, Greely wrote to them as respects the policy in question, "I wish you would relieve us of this risk as soon as possible;" stating also in his letter that he had just learned from two special agents who had recently inspected the Anoka City mill, that it was a very undesirable risk. Greely testifies, on the other hand, that he used the words, "You will please cancel our policy at once;" but, as the letter was not produced at the trial, the notice must be taken to have been as defendants testify,—the principal question to be determined on this appeal, being whether the court should have directed a verdict for the plaintiff upon the evidence in the case.

1. The fire took place four days after the receipt of the letter by the defendants, and no good reason appears why they might not have canceled the policy within that time if they had been disposed to; and if, under the circumstances, the letter of Greely ought to be construed as an instruction by an authorized superior agent to cancel the policy, the defendants are liable. They were bound to the exercise of good faith and reasonable diligence in discharging the duties which they owed to their principal; and to make good any loss or damages arising from any negligent omission on their part in departing from the instructions of their superiors in the management of the company's business intrusted to them: *Franklin Ins. Co. vs. Sears*, 21 Fed. Rep., 290.

2. There is upon the evidence no question but that Greely was in fact authorized to order the cancellation of policies by the local agents. But the defendants claim they had no notice of this fact, and did not understand that his agency included such authority. They admit, however, that they understood that he had general authority over the business, except to order the cancellation of risks in their hands, and he had previously, on several occasions, examined

their books, and given directions as to risks, and forbidden renewals. Though he was styled "special State agent for the company," it is apparent that his agency was general as respects the supervision of risks taken by the agents over whom he was placed, and it would be their duty to obey his instructions in respect to the same. The defendants had not known of cases where State agents had canceled risks, but they knew of no limitation upon his authority in the premises which prevented the exercise of it and their neglect to comply with the request or direction contained in his letter of February 28th was placed by them on entirely different grounds.

In their reply to his letter dated March 1st, they say the risk would expire April 19th, and ask if he (Greely) could not allow it to run to expiration, and add that they disliked to cancel it, and that it would be an accommodation to them to allow it to run. This letter was not received by Greely until after the fire, which occurred on March 4th. On the morning previous to the fire, they received a letter from the general western agent at Chicago stating that Greely had reported his action in reference to the cancellation of the risk in question, and that the risk was considered unsafe and undesirable, and coinciding with his opinion that the company ought "to retire from the risk." This, to our minds, did not abrogate or supersede the action of Greely, but was a recognition of Greely's right to cancel, and an approval of his action. He might well assume that Greely had better means of information on the subject. Being a superior officer, he might have interfered; yet it is clear that he was not disposed to do so, but left Greely's direction in full force. It is evident that the defendants were unwilling to cancel, and believed that their superiors were mistaken as to the danger, and they therefore desired delay, at least till the result of further correspondence or investigation. But, as they received no authority or encouragement for such delay from the company, the delay was in the mean time at their risk if a fire should occur.

It is clear from their letter in response, written immediately on receipt of his letters, that they regarded the latter as a direction to cancel, and this is confirmed by their conversation with him after the fire; and it would seem plain from the uncontradicted evidence that there was really no misunderstanding by them either as to the scope of his authority or the meaning of his letter. The company had a right to act upon its own investigation, and upon information derived from other sources than through them; so that if the agents, from a mistaken view as to the safety of the risk and the wisdom

of canceling it, or for any cause personal to themselves as agents of the company, delayed acting, it was at their own peril.

3. It is also urged by the respondent, that it does not appear that the plaintiff has lawful authority to do business in this State, nor that the defendants had in their hands money of the plaintiff with which to repay amount of the unearned premium. As respects the first of these objections, the plaintiff was bound by the policies which these agents procured (*Ganser vs. Fireman's Fund Ins. Co.*, 25 N. W. Rep. 943); and it would clearly have a right to require them to cancel and discontinue such risks, and they were of course bound by its orders in any matter affecting its liability upon the same. And as to the second objection, the defendant did not in their reply to Greely, or in any communication with him, place their omission to cancel the policy on any such grounds, but the excuses made were of an entirely different nature, and there was no claim or pretense that they did not have sufficient funds of plaintiffs in their hands, derived from premiums, to pay the amount in question, which must have been small, as the policy had nearly expired. No prominence appears to have been given to this point in the court below.

We are of the opinion that there should be a new trial. Order reversed.

SUPREME COURT OF MINNESOTA.

BOWLIN

vs.

HEKLA FIRE INS. CO.*

There is a policy of insurance contained a provision that, when a loss occurred under it, "the assured should forthwith give notice in writing of said loss to the company, and within thirty days thereafter render a particular account and proof thereof," which was made a part of the contract, a local agent who is simply authorized to fix rates of insurance and countersign and deliver policies, subject to the approval of the company, has no authority to waive such provision of the policy.

HAWKINS & OLDENBURG and S. F. WHITE, for Bowlin.

LUSK & BUNN, for Insurance Company.

VANDERBURGH, J.

The policy of insurance sued on, contains a provision that, when a loss occurs under it, the assured "shall forthwith give notice in writing of said loss to the company, and within thirty days thereafter render a particular account by separate items and proof thereof, signed and sworn to by the assured," as therein specially set forth. This is one of the provisions which are expressly made part of the contract, to be resorted to in order to determine the rights and obligations of the parties. It is also provided that payment of a loss "shall be made within sixty days after the proof of the same required by the company shall have been made by the assured and received at the home office, and the loss shall have been ascertained and proved in accordance with the terms and provisions of this policy," unless the property be replaced, or the company shall give

Decision rendered, February 21, 1887.

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notice of its intention to rebuild, etc.; and compliance with these provisions is made essential to a right of recovery under the contract.

The several provisions above referred to must be read together, and it is manifest that compliance therewith on the part of the assured as to time, as well as in other respects, is a necessary condition precedent to the right of recovery, unless a waiver on the part of the company is shown: *Smith vs. Insurance Co.*, 1 Allen, 297; *Home Ins. Co. vs. Lindsey*, 26 Ohio St., 348; *Gies vs. Home Ins. Co.*, 12 Minn., 285 (Gil., 183); 2 Wood Fire Ins. Co., § 438.

In the case at bar no notice of the loss is shown to have been given, nor was any proof of loss forwarded to the company, until long after the expiration of the time provided therefor by the policy. The plaintiff, however, relies upon the alleged waiver of the conditions and requirements of the policy.

The evidence to establish such waiver consists solely of certain alleged statements and assurances of the local agent who took the risk, and through whom the policy was issued, made to the attorney of the plaintiff in conversations between them within the thirty days next succeeding the fire. The court below determined that the company was bound by the language and conduct of the local agent in the premises, and the jury found for the plaintiff.

The authority and duty of the local agent, as proved by the plaintiff himself on the trial, shows very clearly, we think, that he was not a general agent of the company, and that his authority did not extend to the adjustment or settlement of losses, and that he had no power to bind the company as respects such proceedings under the policy. The proofs must necessarily be forwarded to the "home office," and delivering to the local agent would not bind the company; and there is nothing in the policy or in the evidence adduced by plaintiff tending to show that he had any authority or responsibility in respect to any negotiations or transactions between the assured and the company about the proof or settlement of the loss. The plaintiff's evidence shows, and there is no testimony inconsistent with it, that he had authority to issue policies and fix rates subject to the approval of the company, and that his instructions were to have nothing to do with a loss except to report it. There is nothing to show that the plaintiff's agent understood the facts differently. What foundation is there, then, for any claim on his part that he was misled by the company, or that it had waived the stipulations in the policy? There is nothing in the evidence

tending to prove that the company had clothed the agent with apparent authority to act for them in the adjustment of losses, unless it could be inferred by the issuance of policies, and the fact that his duties are not expressly defined or limited therein. The mere assumption of authority by the agent, and reliance thereon by the plaintiff, will not strengthen the case in the absence of evidence of authority conferred or recognized by the company: *Bush vs. Insurance Co.*, 63 N. Y., 531; *Marvin vs. Wilber*, 52 N. Y., 270.

In *Underwood vs. Insurance Co.* (57 N. Y. 504), where the local agent was held to have bound the company by his language and conduct, it appeared that he had previously been allowed to adjust and pay losses without first consulting the company, and that he appeared to have acted for the company in reference to the particular loss, with its knowledge and sanction. The grounds upon which *Goodwin vs. Insurance Co.* (73 N. Y. 492) is distinguished from *Bush vs. Insurance Co.*, *supra*, show that these cases do not conflict.

It may, perhaps, be doubted, whether it can reasonably be inferred from the evidence, that the agent intended to speak in behalf of the company, or as their agent, in what transpired between him and the plaintiff; but, be that as it may, it is clear that the evidence of the latter affirmatively shows that the agent was not, in fact, authorized to act for the defendant in proceedings relating to the adjustment, and fails to disclose any act or conduct of the defendant from which such authority might reasonably be inferred by policy-holders. In the matter of the original contract, and while the property, which is the subject of it, continues in existence, the local agent must be deemed to be possessed of certain incidental powers, by virtue of which he may waive certain conditions in the policy. But when the subject of the risk is destroyed, and the assured asserts a claim against the company, the proceedings to establish and enforce such claim are not impliedly embraced within the scope of his agency. It is not to be presumed in the absence of express authority or conduct on the part of the company from which it may be implied, that the local agent is empowered to suggest a different mode of settlement, and bind the company to a different line of procedure from that designated in the policy: *Lohnes vs. Insurance Co.*, 121 Mass., 439; 2 *Wood Fire Ins.*, § 420; *Bush vs. Insurance Co.*, *supra*. Of course a different rule would prevail in the case of a general agent or others employed in the department of the company's business, embracing the adjustment and settlement of losses.

2. The provisions of the insurance law of 1868, c. 22, were superseded by the act of 1872, c. 1, upon the same subject. The last-named act covers the same ground, and was intended to embrace all the provisions applicable to the subject. Section 8 of the last-named act defines who shall be deemed to be agents of insurance companies, and provides that nothing in the act shall be construed to imply that an agent has any power to bind a company not expressly or by necessary implication given him by the company. The question here under consideration is not, therefore, affected by the statute. Order reversed.

SUPREME COURT OF PENNSYLVANIA.

Error to the Court of Common Pleas of Franklin County.

LANCASHIRE FIRE INS. CO. }

vs. }

NILL.

N. had insured a mill through B. in the Clinton Company. On August 9th the mill burned down; on August 10th N. notified B. of the loss, who then telegraphed N. to come to his office, where he informed him that, on August 1. the Clinton Company had ordered the policy on the mill canceled, and that he, B., had placed the risk with the Lancashire Company, for which he was also the local agent. N. objected to surrendering his Clinton policy, but was induced to do so on the representations of B. that the Lancashire Company was good and safe. Proof of loss was made to the Lancashire Company, and suit brought to recover the insurance. The Supreme Court reversing the court below, Held, that it was error to have permitted the case to go to the jury; that under the plea of non est factum there was no evidence of the execution and delivery of the policy; that no consideration had passed, and that the action of B. was a fraud on the defendant company; that the Clinton policy was valid up to the time when B. induced N. to surrender it, and therefore there could have been no transfer of the risk until after the 9th, when the fire took place.

F. M. KIMWELL, Esq., and MESSRS. SHARP & ALLEMAN, for Plaintiff in Error.

JOHN STEWART, Esq., for Defendant in Error.

GORDON, J.

This case is all wrong. In the very outstart, under the defendant's plea of non est factum, it was the plaintiff's business to prove the execution of the policy sued upon, but this was not done; nevertheless the court, notwithstanding the defendant's objection, admitted it and sent it to the jury, with the instruction that they should treat it as the defendant's deed if they found that it was countersigned by Brown and Beggs, and if they were also satisfied that these persons were the company's agents. In this there was double error, for

* Decision rendered, Oct. 4, 1886.—From *Legal Intelligence*.

neither was the execution of the policy proved, nor the agency of Brown and Beggs. "It purports," says the court, "to have been signed by Henry Robinson, the United States manager, and countersigned by Brown & Beggs at Harrisburg. Mr. Nill tells you that it was received by him from Mr. Brown, of the firm of Brown and Beggs, and that Brown & Beggs claimed to be the general agents of the company at Harrisburg; he treated with them as such. Then you are told further that the adjuster, or one representing himself to be the adjuster of the company, came here and saw Mr. Nill in reference to the fire." All this, however, is assumption without evidence for its support. We have examined the testimony in vain in order to discover such proof as would warrant the submission of such statements to the jury. There is nothing to show that either Henry Robinson or Brown & Beggs had any authority whatever to sign or countersign the defendant's policies. In this branch of the case, therefore, the plaintiff signally failed, and the court should so have instructed the jury. But admitting the execution of the policy, and the agency of Brown and Beggs, and still the plaintiff was not entitled to the verdict.

The court directed the jury to determine whether Brown and Beggs were not acting as agents as well for the plaintiff as for the Lancashire Company. Of this, however, there was no evidence—the very contrary. Nill obtained the Clinton policy from these agents, and paid them the premium through the medium of the post-office, and never had a personal interview with either of them until the 11th of August following. Mrs. Nill had no agent but her husband, nor was any other necessary. She desired no change; the Clinton policy was perfectly good, and could not be canceled without notice to her, and neither she nor her husband knew of the action of Brown & Beggs until the date above mentioned, which was after the loss, when these men imposed alike on Nill and the defendant by inducing him to surrender the Clinton policy and accept the one now in suit.

A brief history of this transaction is found in his affidavit of August 17, 1882, wherein Nill testifies: "On Friday morning the 11th instant, I took the 8.23 A. M. train at Greencastle for Harrisburg, arriving there about 11 A. M. I went from the depot to Brown & Beggs' office, where I was obliged to wait until after 12 M. before I saw said Mr. Brown. Mr. Brown came to the office. He had to tell me the Clinton Insurance Company had, about August 1st, 1882, canceled their policy on the said mill, and that he

had put us in the Lancashire Fire Insurance Company, but he neglected to notify us of the change. I then asked him if it would make any difference in the exchange, or whether our rights would be affected or prejudiced by the exchange. He, the said Brown, said it would not, as the company he had put us in was a first-class company. I then gave him, the said Brown, the said Clinton policy, and he gave me the Lancashire policy. This was the first notice we had received of any change or any desire for a change.' From what is here said, and it accords strictly with his evidence given on the trial of the case, it is very clear that Brown's previous action was without warrant from the assured, and it will, we presume, hardly be pretended that, had Nill, on August 11th, refused to surrender the Clinton policy, Brown's pretended cancellation of it would have released that company from its obligation to Mrs. Nill. But if the Clinton policy was still in force on August 11th, 1882, two days after the fire, the action of Brown & Beggs, in the delivery of the Lancashire policy as a substitute for that of the Clinton Company, was a mere attempt to shift the loss from the company upon whom it had fallen, to the other, which, at the time of the fire, had assumed no responsibility. It requires no argument to show that this could not be done, and that the attempt to accomplish a design of this kind was a fraud on the defendant. Neither does it appear from the evidence that the defendant received a premium as a consideration for its policy. The court allowed the jury to infer that as Brown & Beggs were agents for both the companies as well as for Mrs. Nill, and as, on cancellation of the first policy, the unearned part of the premium must be refunded, therefore these agents received this money thus due the plaintiff, and paid it on the Lancashire policy. This might have been so, but as there was no evidence of it, the court ought not to have devised and sent to the jury a theory that had no foundation in fact. Following the regular order of business, the return premium would not be payable to the insured until the policy had been surrendered, and, of course, until after that time there was nothing in the hands of Brown & Beggs belonging to the plaintiff which could be paid to the defendant.

Thus, however, we view the case, we discover no foundation of fact on which it can rest, or which would warrant a submission of it to the jury.

The judgment of the court below is reversed and a new venire awarded.

UNITED STATES CIRCUIT COURT.

WESTERN DISTRICT OF PENNSYLVANIA.

CHARLES B. BROCKWAY, ADM'R OF BECKWITH S.
BROCKWAY,

vs.

CONNECTICUT MUTUAL LIFE INS. CO. OF
HARTFORD, CONN.*

Where a policy of life insurance is issued in consideration of the declarations and representations made in the application for the same, and the payment to the company of the premiums by A, assuring the life of B for the term of the whole continuance of his life and providing for the payment on the death of B of the sum assured "to the said assured, his executors, administrators, or assigns," the beneficiary, assured, or promisee under said policy is A, the party who made the application and paid the premiums, and not B, who is but the life insured.

The right of action on such a policy upon the death of B is in A, and not in the legal representatives of B.

The fact that shortly after the date of the policy B indorsed upon it an assignment of the same to A, to which the company was not a party, is an unimportant circumstance and but an *ex parte* transaction between A and B themselves, and cannot have the effect of changing the contract relations under the policy issued, existing between A, the assured, and the company.

Action of debt on a policy of insurance for \$10,000, issued by the defendant at the application of one Daniel F. Seybert, on the life of Beckwith S. Brockway, and which policy contained, indorsed upon it shortly after it was issued, a written assignment thereof by Brockway to Seybert, but which assignment had never been presented to or approved by the company; demurrer by the defendant "that in and by the declaration and the policy (and assignment thereof) therein mentioned and declared upon, it is not shown or made manifest that any cause or right of action ever arose, accrued, or existed in favor of the legal representatives of Beckwith S. Brockway, deceased," to which demurrer the plaintiff filed a joinder in demurrer.

B. F. HUGHES and JOHN G. FREEZE, *for Plaintiff*.

W. S. PURVIANCE, Esq., *Contra*.

* Opinion filed, February 4, 1887. — From *Pittsburgh Legal Journal*.

ACHESON, D. J.

This suit is upon a policy of insurance on the life of Beckwith S. Brockway, issued upon the written proposal of Daniel F. Seybert, setting forth the latter's desire to effect the proposed insurance, and that he had an interest to the full amount thereof in the life of said Brockway. To the inquiry, "for whose benefit the assurance is proposed?" the written answer was, "Daniel F. Seybert." The original annual premium and the second annual premium—the only ones ever paid—were both paid by Seybert. By the terms of the policy the defendant company promises and agrees "to and with the said assured" to pay the sum insured "to the said assured, his executors, administrators, or assigns," etc.

The proposal and answers are expressly made part of the policy and all are embodied in extenso in the plaintiff's declaration. The demurrer raises the question whether the right of action is in the plaintiff, the administrator of Beckwith S. Brockway, deceased, or in Daniel F. Seybert. The question is to be solved by ascertaining the person meant by the term "assured" as the same is used in the policy.

Now, as already stated, and as clearly appears on the face of the papers constituting the contract, Daniel F. Seybert was the applicant for the policy, in his proposal therefor claimed to have an interest in Brockway's life to the entire amount insured, was the declared beneficiary, and paid the premiums. In the absence, then, of anything indicating a contrary intention, the conclusion is irresistible that Seybert was the assured and promisee. The point, indeed, is ruled by the case of *Connecticut Mutual Life Insurance Company vs. Lucas*, 108 U. S., 498. The policy of insurance sued on there and the one in suit here are in form precisely alike, and in their material facts the two cases do not differ.

That some two months after the date of the policy an assignment from Brockway to Seybert was indorsed thereon, seems to me an unimportant circumstance. The insurance company was not a party to that assignment and never approved it. It was altogether an *ex parte* transaction. Therefore, it cannot have the effect of changing the contract relations of the parties; nor does it import their mutual understanding of their contract. At most, it indicates only that Seybert and Brockway conceived it to be necessary that the policy should be so assigned.

I am of opinion that the declaration does not disclose any cause or right of action existing in the plaintiff, and that the demurrer must be sustained.

UNITED STATES CIRCUIT COURT.
EASTERN DISTRICT OF LOUISIANA.

FINK

vs.

QUEEN INS. CO.* /

Where the insurance was procured by the mortgagee on his own interest and the policy, by mistake, was made in the name of the mortgagor, this error will not be allowed to defeat it, but equity will reform the contract, and direct the payment of the insurance money to the mortgagee.

In Chancery.

B. R. FORMAN, *for Complainant.*

J. AD. ROZIER, *for Defendant.*

PARDEE, J.

This cause came on to be heard upon the bill, answer, exhibits, and evidence, and was argued; and, it appearing to the court that the complainant, Peter Fink, owned a debt secured by mortgage, and had paid taxes on the property insured and described in the bill, exceeding in the aggregate \$700, and did make a contract of insurance of said mortgage interest with the defendant for said amount of \$700, and that the policy, by mistake, was made in the name of Mrs. A. S. Lacey, the owner, as the assured, instead of in the name of said Peter Fink, the real contracting party, and whose mortgage interest was intended to be assured; and it appearing that the mortgaged property was destroyed by fire during the term of the policy, to the loss of the said mortgagee of over \$700; and that it is against equity to permit the defendant to set up its mistake and the actions of Mrs. A. S. Lacey, who was no party

* Decision rendered, January 24, 1885.

to the contract, to defeat the claim of insurance under said contract,—it is thereupon and therefore ordered, adjudged, and decreed by the court that the policy of insurance dated twentieth of April, 1881, issued by the defendant to Peter Fink, be reformed, so as to read as follows in its substantive parts, to wit :—

The Queen Ins. Co., of Liverpool and London, England, in consideration of twelve 50-100 dollars paid to it by Peter Fink, do hereby insure said Peter Fink to the amount of seven hundred dollars against loss or damage by fire on the one-story, frame, shingled dwelling-house, \$625, fences, \$45, cistern, \$30, situated on east corner Chestnut and Homer Streets, in New Orleans, to secure and protect his claims secured by mortgage lien and privilege upon the said property to the amount of seven hundred dollars, within and for the term of one year from the twentieth of April, 1881.

And it is further ordered, adjudged, and decreed that the defendant, the Queen Insurance Company, of Liverpool and London, England, do pay to the said plaintiff, the said sum of \$700, with 5 per cent per annum interest from the twentieth of January, 1882, until paid, and the cost of this suit, to be taxed by the clerk of the court.

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LOWER COURT DECISION.

RELIEF AGAINST FRAUDULENT JUDGMENT.

Luzerne, Pa., Common Pleas.

BROCKWAY, ADMINISTRATOR,
vs.
ÆTNA LIFE INSURANCE COMPANY.*

In 1870 suit was brought by "A," as administrator, on a policy of life insurance. In the same year an alleged will of the decedent was proved, letters granted to "B" and those to "A" revoked. In 1881 "B" sued on the same policy. This action was tried on its merits and judgment in favor of the defendant entered in 1875. A writ of error was taken to the judgment and non-prossed by the supreme court in 1876. Pending this suit "B" was removed from his office as executor by decree of the Orphans' court in 1873, and letters of administration c. t. a., d. b. n. granted to "A," who, however, was not substituted on the record. All the files of the case have disappeared. In 1885 the register of wills, upon proceedings before him, vacated the probate of 1870 and declared the will a forgery. "A" then took a rule upon the defendant to plead in the original suit brought by him in 1870. The defendant then filed a discontinuance of the suit and release of the cause of action executed by the plaintiff under seal in 1881. On petition by "A" for a rule to show cause why this discontinuance should not be stricken off, setting forth that he had no recollection of signing such a paper, and that if he did execute it it must have been when he was intoxicated — *Held*.

That "A" must still be regarded as the administrator of the decedent.

That under all the circumstances the rule must be denied, without prejudice, however, to the right of the plaintiff to proceed by bill in equity.

While courts of common pleas, upon a rule to show cause, etc., have all the powers of courts of chancery to relieve against judgments obtained by fraud, yet the better practice, particularly in cases where the judgment was not by default or by confession on a warrant of attorney, would seem to me to send the party to his bill in equity.

* Decision rendered, June 15, 1886.

Sur motion of plaintiff to show cause why discontinuance shall not be stricken off.

B. F. HUGHES, for rule.

J. V. DARLING, *contra*.

DREHER, P. J.

Beckwith S. Brockway died in 1869, and on the 17th day of December of that year letters of administration upon his estate were granted to the plaintiff by the register of wills of Luzerne County, and in October, 1870, the present suit was brought on a policy of insurance issued by the defendant upon the life of said Beckwith S. Brockway. In November, 1870, a paper purporting to be the will of the deceased was produced before the register and probated, and letters testamentary were granted to Daniel F. Seybert, who was named therein as executor and legatee. The letters of administration, previously granted to the plaintiff, were, of course, revoked. On the 6th of March, 1871, Seybert brought suit, as executor to his own use, against the Aetna Life Insurance Company, to No. 287, April term, 1871, on the same policy of insurance upon which the present suit is based. That case was referred to Judge Hand, who was then a practicing attorney. The report of Judge Hand in favor of the defendant was filed May 22, 1874, and same day exceptions thereto were filed. June 10, 1875, the exceptions were dismissed and judgment entered for the defendant, on the report of the referee. The case went to the supreme court on writ of error, and judgment of non pros. entered there March 19, 1876. The remittitur was filed here January 27, 1886. On the 13th day of December, 1873, Daniel F. Seybert was removed from his office of executor by order of the Orphans' Court, and on the 6th day of January, 1874, the register granted letters of administration de bonis non, cum testamento annexo to the said Charles B. Brockway. Brockway was not substituted as plaintiff in the suit commenced by Seybert, as executor, so far as the record before me shows. That suit was, however, proceeded in, as above stated, to final judgment, and judgment of non pros. in the supreme court, on plaintiff's writ of error. So the matter rested until 1885, when a petition was presented by the heirs of Beckwith S. Brockway, to the register, setting forth that the alleged will was a forgery, and praying for a rehearing, and that the decree admitting the same to probate should be vacated. The register, on hearing, vacated the decree, and pronounced the alleged will a forgery and nullity. Thereupon the plaintiff ruled the defendant to plead.

in the present suit. The defendant then, on the 31st day of October, 1885, filed in the prothonotary's office a paper of which the following is a copy :—

Charles B. Brockway, administrator of Beckwith S. Brockway, deceased, vs. *Ætna Life Insurance Company*, of Hartford. No. 932, November Term, 1870. In Common Pleas of Luzerne County.

For a valuable consideration by me received, from the *Ætna Life Insurance Company*, I hereby discontinue the above suit, and forever release the said Company from all claims and demands under any and all policies of insurance issued by said company upon the life of Beckwith S. Brockway, deceased.

Witness my hand and seal this 5th day of November, 1881. Witness present, C. B. BROCKWAY, [SEAL.]

R. BUCKINGHAM.

Adm. of B. S. Brockway, deceased.

The plaintiff now presents his petition and asks for a rule on the defendant to show cause why the discontinuance entered on the filing of the above-mentioned paper should not be stricken from the record. The petition sets forth "that the petitioner has no recollection of ever having signed such a paper; that if such a paper was signed by him at any time it must have been done at a time when he was under the influence of liquor and not able to appreciate the nature of his act or the force and effect of the paper signed, or to understand the contents thereof; that he never, when in the possession of his faculties and capacity to reason, signed the said paper; that had the same been presented to him at a time when he was in the possession of his faculties he would have utterly refused to sign it; that at the time when the paper purports to have been signed he was in the habit of drinking to excess, and was frequently disqualified from attending to business by reason thereof; that the said paper, if genuine, was obtained by fraud; that the petitioner never received any consideration of any kind or character whatsoever for signing or executing said paper and that the same, if it had been executed by the petitioner under circumstances which might have bound him, would have been a fraud upon the heirs of B. S. Brockway, deceased, for whom he was acting as administrator aforesaid, and must have been known to be so by the defendant.

The power of the court to hear and dispose of the matters alleged by the plaintiff, upon a rule to show cause, is not denied; but the defendant contends that the case presented is one that should be referred to the equity side of the court for the reasons:—

I. That the applicant is not the administrator. It is argued that as the original letters of administration granted to the plaintiff

were revoked on probate of the alleged will, he should have taken out new letters when the register revoked the decree admitting the will to probate. In the brief of counsel it is said, "If the rule is granted he will be enabled to occupy the position of administrator without appointment, without sureties, and without oath. Although he still stands in the position (which he has occupied since January, 1874) of administrator c. t. a., he now seeks to represent the estate in a different capacity, and one in which he is relieved from the obligation of an oath and the responsibility of sureties." The revocation of the decree admitting the will to probate was not a revocation of the letters of administration de bonis non granted to the plaintiff. He is still the administrator de bonis non, and I take it, in a suit by or against him, it would not be necessary to add to his title of administrator the words de bonis non. So, in any act he might do, describing himself as administrator would be sufficient. Indeed, the paper upon which the discontinuance was entered is signed by the plaintiff as administrator simply. The will having been declared void the assets are to be administered and distributed under the intestate law.

II. It is contended that the plaintiff, by virtue of his office of administrator de bonis non, c. t. a., became a party to the suit commenced by Seybert, executor, and that the proceedings therein, after the dismissal of Seybert and the appointment of the plaintiff, were actually carried on by him, and, therefore, the judgment in that suit is conclusive against him. It seems there was no formal substitution of the plaintiff, but it is contended that after the dismissal of Seybert and the appointment of the plaintiff, the legal presumption is that all subsequent steps in the cause were taken by him, he being the only person legally entitled to act. The plaintiff says this question does not arise on the present motion; that it may arise and be disposed of, if the discontinuance is stricken off, under the plea of former recovery. Whether the judgment in the suit commenced by Seybert, executor, is conclusive against the plaintiff, may depend upon parol evidence, as I understand the files are missing. It may be necessary for the defendant to prove, if such be the fact, that the plaintiff did appear in that suit and was heard before the referee and in court. This may become a very important question; indeed, it is manifestly important; and it seems to me, especially as the papers have been mislaid or lost, it can be much better and more satisfactorily investigated before a master than on a trial before a jury. That

judgment had stood unimpeached for ten years before the institution of the proceeding before the register to have the decree admitting the alleged will to probate revoked, during all which time the plaintiff either was or should have been a party to it in his character of administrator de bonis non.

It was decided in *Cochran vs. Eldridge* (18 Wr., 365) that the court of common pleas have the right to exercise all the powers of chancery to relieve against judgments obtained by fraud by rule to show cause. Judge Mitchell, in his excellent work on motions and rules, referring to the case of *Cochran vs. Eldridge*, says: "Notwithstanding this decision, however, it has not been usual to exercise equitable jurisdiction in this form, except as already stated, over judgments by default, or by confession on warrant of attorney; and it is not likely that a more extended practice would be encouraged, since the grant of equity powers, which are ample, and offer some facilities for the protection of the rights of parties which the common-law procedure does not, and especially since it has been held that an application to the court to open a judgment is not a bar to a subsequent bill in equity for the same relief: *Wistar vs. McManes*, 4 Sm., 318." In view of the complication in this case, growing out of the different suits, and of the long delay in moving to bring the present suit to an issue, it seems to me this is a very proper case for a bill in equity, and the motion for a rule is not allowed.

The motion for a rule to show cause is denied, without prejudice, however, to the plaintiff to proceed by bill in equity.

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REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF ILLINOIS.

Appeal from Appellate Court.—Second District.

NORTHWESTERN MUTUAL LIFE INS. CO. }

vs. }

MARTHA AMERMAN.*

The insured was killed while coupling cars, an employment which, according to its terms, avoided the policy. But after engaging in this employment the insured wrote to the agent, who replied that the company would not issue a permit for the business, but recommending that the insured should secure an accident policy which would cover the period of his employment when the policy would again apply. Afterwards the company sent notice of premiums due, and returned the customary receipt continuing the policy in force upon their payment.

* Decision rendered, January 26, 1887.
VOL. XVI.—21.

Held, That the mere act of the insurer in receiving the premium would not waive a forfeiture if paid with the full understanding that the terms of forfeiture would be insisted on. Such waiver or estoppel must be based on the insured being misled. The company could rightfully accept the premium in order to keep the policy in force upon the termination of the employment.

Held, That evidence of a conversation of insured with the agent giving the renewal receipt tending to show such an understanding was admissible.

Held, That the renewal receipt was not a new contract.

FULLER & GALLUP, for Appellant.

S. S. PAGE, for Appellee.

SHOPE. J.

On the 11th day of February, A.D. 1882, the Northwestern Mutual Life Insurance Company issued a policy upon the life of David A. Amerman in the sum of \$1,000, payable at death to his wife. The policy provided for the payment of semi-annual premiums by the assured on or before noon of the 11th day of the months of February and August of each year; and contained the conditions among others, that if the premiums should not be promptly paid when stipulated, and "if the said person (the assured) shall be personally engaged * * as engineer or fireman of any locomotive engine, or in switching or coupling or uncoupling cars, or be employed in any capacity on the trains of a railroad except as passenger or sleeping-car conductor, mail agent, express messenger, or baggage master, * * without, in each or either of the foregoing cases, having first obtained the written consent of the company, * * * then, and in every such case this policy shall be null and void."

The assured at the time of issuing the policy was a clerk in the office of the Wabash Railway Company, but shortly afterwards went upon the railroad in the capacity of brakeman, and was subsequently promoted to the position of conductor of a freight train. It appears from the evidence that part of his duty as such conductor, was to couple and uncouple cars of his train; and while thus engaged on the morning of the 11th day of February, 1883, he was caught between the ends of projecting timbers with which the cars were laden, and so injured that he died at 8 o'clock A. M. of that day. The consent of the company to his entering upon the prohibited employment had not been obtained. After engaging in the employment of braking, the assured wrote to the State agents of appellant, advising that he was so engaged temporarily, while expecting something better, and asking them what change would be necessary in

his policy, if any. This was on the 20th day of April, 1882, and on the first day of May these agents replied as follows:—

CHICAGO, ILL., May 1, 1882.

D. A. AMERMAN, Esq.,

309 Maple Street, Peoria, Ill.

DEAR SIR: Your favor at hand. I am sorry the company will not issue permit for your present business. Let me tell you what to do. Take out an accident policy for six months or a year. In the mean time you may quit braking, when our policy would be good. The accident policy pays you in case of death by or resulting from accident, and pays you a weekly compensation while you are laid up. You cannot, probably, get a life policy in any first-class company for your present business. The accident policy will not cost you a large amount, and when you quit braking you will have our policy, which is as good as you can get. Mead & Dexter, of this city, have a good accident company. I will have them write you. Yours,

DEANE & PAYNE.

It is obvious that the assured, by entering into this employment, committed a breach of the condition of the policy; and it is not claimed that the company is liable unless it has waived the condition, or has done some act that will estop it from interposing the breach of the condition as a defense.

The acts and declarations of the company relied upon as estopping the company from setting up a breach of the condition mentioned as a defense to this action, occurred after the receipt by the assured of said letter from Deane & Payne, and are, in substance, that on the first of July, 1882, the company sent a notice to the assured that a semi-annual premium on his policy would be due on the eleventh day of August following at noon, and unless the same was paid the policy would be subject to forfeiture, therefore etc., and containing the statement, among others, that "members neglecting to pay are carrying their own risk. Agents have no right to waive forfeitures, * * * prompt payment is necessary to keep your policy in force." That before noon of August 11, the assured paid the premium, and received from the company's agent the following instrument:—

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.
Home Office, Milwaukee, Wisconsin.

Premium.....	\$12.47
Loan.....	3.11

Premium for six months.....	\$9.36
Premium, as above, received this 11th day of August, 1882.	

I. N. FAGAR, Ag't.

For terms of mutual agreement, see policy.

Policy No. 112,006, insuring the life of David A. Amerman, is hereby made binding for six months from the 11th day of August, 1882, provided payment as per margin is made in due time and the receipt is countersigned by I. N. Fagar, agent, Peoria.

This payment and receipt shall not have force or effect to continue the policy beyond the period above stated.

J. W. SKINNER, Secretary, Ill.

And that afterwards, and on the 1st day of January, 1883, a like notice in all respects as that of July 2d, was sent to assured, notifying him of the semi-annual premium falling due February, 11, 1883. These facts are properly replied to, the plea of the company setting up the breach of the condition in the respect named as a defense. In the court below appellant company contended that the assured paid the premium with the full knowledge that the company would not carry a policy on his life during his continuance in employment in the capacity of brakeman, etc., and that he made the payment in accordance with the suggestion of the letter of the State agents, for the purpose of preventing the lapsing of his policy and for no other purpose, and that the company was not, therefore, estopped by the acceptance of the premium.

At the trial, to maintain this position, it put its local agent Fagar upon the stand, who among other things, testified :—

Am agent for defendant. Knew Mr. and Mrs. Amerman. Became acquainted with them about the date of the policy. David A. Amerman paid all the premiums that were paid upon such policy. The date of the policy was the first one, and the second on August 11th, following. Question. State what explanation, if any, you gave Mr. Amerman at the time of delivering this last receipt to him in reference to it? (Objected to—objection overruled.) Ans. Well, I told him if he got hurt while braking on the train his policy would not amount to anything, but if he should die in any other way he could collect his policy, and I guess he got the same from the company. He had written to the company before he came to me. Q. What reply did Mr. Amerman make to that, if any? (Objection by plaintiff—objection overruled.) A. Well, he said he would pay it that way—with that understanding, which he did. Q. Was there anything else said at that time that you recollect of, as explanatory of your question or his answer? A. I don't know as there was.

On motion of appellee the court excluded from the jury the three foregoing questions to and answers of the witness, and the defendant by its counsel excepted. It also appeared that the assured at the time of his death had an accident policy of \$1,000 upon his life, but when the same was taken out does not clearly appear.

It is contended by appellee that the company, having received the premium with full knowledge of the breach of the condition of the

policy, is estopped from insisting upon such breach as a defense. It has been repeatedly held in this State and elsewhere, that the receipt of the premium by the assurer, after knowledge that the condition of the policy had been broken, would amount to a waiver of the condition: *Commercial Ins. Co. vs. Spankneble*, 52 Ill., 53; *Reaper City Ins. Co. vs. Jones*, 62 Ill., 458; *Lycoming Ins. Co. vs. Barringer*, 73 Ill., 230. An examination of the cases so holding, however, will, it is believed, show that the assured in each case in paying the premium, was induced to do so relying on the validity of his policy, and that the act of the company, therefore, in receiving the premium would estop it from setting up the forfeiture.

In *Commercial Ins. Co. vs. Spankneble*, supra, the company sought to interpose as a defense facts constituting a breach of a condition of the policy which were known to the agents to exist when the policy issued, and the court says: "To permit the company when the omission was by their own agent, to now avoid the payment of the loss, * * would amount to a fraud. It would be a fraud to permit the company to receive the premium, when they knew that the policy was not binding, and which they never intended to pay."

Conditions like those under consideration are inserted in the policy for the benefit and protection of the insurer, and may be waived either before or after breach thereof; and when the agent of the company, through whom it must act in dealing with the public, knowing of the right of forfeiture, permits the assured to pay the premium to the company, he relying on his policy as valid and subsisting, the company will be held to have waived the condition. It would be grossly inequitable to permit the company to receive the premium from an assured, who was induced thereby to rely upon his policy for indemnity, and then insist upon a forfeiture from facts known by it to exist when the premium was paid. This was understood to be the rule laid down by text-writers, and supported by the adjudicated cases.

May, in his work on Insurance, 507, thus states the rule: "An estoppel arises when the insurer, having knowledge of the facts to which he has the right to take exceptions, or which constitute a defense against any claim under the policy, if he chooses to avail himself of them, so bears himself thereafter in relation to the contract as fairly to lead the insured to believe that the insurer still recognizes the policy to be in full force." It is to be observed that it is the effect upon the assured that gives vitality to the estoppel, rather than the purpose or intent of the insurer; and unless the

conduct of the insurer has in some way misled the assured, or induced him to do some act, or neglect to do something, to his prejudice in relying upon the acts or declarations of the insurer, there can be no estoppel : *May on Insurance, supra.*

It is said by this court "that the doctrine of estoppel in pais is based upon a fraudulent purpose or fraudulent results. If, therefore, the element of fraud is wanting there is no estoppel, as if both parties were equally cognizant of the facts, and the declarations or silence of the one party produced no change in the conduct of the other, he acting solely upon his own judgment. There must be deception and change of conduct in consequence : *Davidson vs. Young, 38 Ill., 152.*

Again it is said : "There must be a change of conduct induced by the act of the party estopped to the injury of another in order to prevent him from showing the truth. If the element of fraud or injury is wanting, there is no estoppel :"*Fowler vs. Elwood, 66 Ill., 447; Powell vs. Rodgers, 105 Ill., 318.*

There can be no fraud if the parties to the transaction are equally informed of all the facts, and act independently upon such knowledge equally possessed by both parties. Nor can it be said that one party has been misled or induced to do an act by the conduct or declarations of another when there has been no suggestion of falsehood, or suppression of the truth by silence or otherwise, and the party acts, after full knowledge upon his own judgment, or according to his own inclination. If, as before substantially stated, the assured paid the premium under the belief, fairly induced by the acts and declarations of the agents of the defendant company, that the policy was to be in force while he continued in the prohibited occupation, the acceptance of the money by the company would estop it from insisting upon the condition of the policy as a defense. The mere act, however, of receiving or collecting the premium by the insurance company, with knowledge of an existing right of forfeiture, has so far as we know never been held to estop the company from setting up such forfeiture, if the assured had no reason fairly to conclude from the acts and declarations of the company or its agents, that the forfeiture had been or would be waived when he made the payment of the premium, or unless the payment was made in reliance upon the validity of his policy, induced by the acts, declarations, or silence of the company. If the assured knew or understood that the company intended to insist upon the forfeiture for breach of the condition of the policy under consideration if he came to his

death by reason of or while in an employment in violation of such condition, and with such knowledge, for the purpose of keeping his policy from lapsing for non-payment of premium so that it might be in force after he should quit such employment, as suggested by the company's State agents, or for any other reason he might deem to his advantage, paid the premium, the company might rightfully accept it for the purpose for which it was paid, without being guilty of fraud in setting up the breach of such condition, which it had never consented to waive, and which the assured knew it intended to insist upon.

Manifestly, then, it was material to the inquiry to know whether the payment of the premium by the assured, August 11th, was made relying on the validity of his policy, induced by the acts or declarations of appellant company, or whether he knew that the company intended to insist upon the condition of the policy if death ensued in consequence of his employment. It might be greatly to his advantage to suspend the force of his policy temporarily while so engaged, and revive it when the necessity for such employment ceased. It not unfrequently happens, we presume, that it is necessary or desirable for persons having life insurance to engage temporarily in some occupation, or travel for business or pleasure in latitudes prohibited by their policy. In this case the assured wrote to the State agents that he had entered the employment on the train temporarily, while waiting for something better; and was promptly informed by the company, through these agents, that the company would not carry the risk while he was so engaged.

If the position contended for by appellee is correct, then it follows that the insurance company, though acting in the utmost good faith, could not receive the premium at the request of the assured, and for his benefit, with full knowledge on his part that the company would not carry a policy on his life, or waive its right of forfeiture while the prohibited occupation continued, without being estopped from asserting its right of forfeiture if death ensued from such employment. It would follow that if the assured from necessity, or because he might find it profitable or desirable, engage temporarily in an occupation or travel in a latitude not permitted by his policy, there is no alternative. He may not pay his premium to prevent his policy from lapsing for non-payment of premium, and thereby keep his policy in condition to revive when he resumes an insurable occupation, or returns to a locality in which by the terms of his policy he is permitted to reside; but he must permit the policy to lapse,

and reinsure when the temporary prohibited occupation or residence has ceased, if he desires so to do, and remains insurable, at such increased rate of premium as his increased age may demand. We are not prepared to so hold.

It follows, therefore, that the evidence of the witness Fagar, as it tended in some degree to show for what purpose the premium was paid, and whether or not the insured relied upon his policy as for valid and subsisting insurance while he was engaged in braking on the trains of a railroad, was improperly excluded by the trial court. All of the facts and circumstances attending the payment of the premium, and illustrative of the acts of the parties in respect thereto, were, we think, pertinent to the issue made by the pleadings, and under proper instructions, should have been submitted to the jury.

It is said in argument that the evidence shows that Mrs. Amerman, plaintiff, paid the premium of August 11th in the absence of her husband. That may be true; yet the whole evidence on that subject should have been submitted. The question of how much the proposed evidence establishes, and the credibility of the witnesses, is for the jury. If the evidence tends to prove any matter material to the issue, it is admissible.

It is also contended that the receipt given is a new contract, extending the insurance six months from its date. This, we think, is a misapprehension. It will be found upon examination of the policy that this receipt is issued under the third condition of the policy, and in pursuance thereof. No new contract of insurance was made or intended to be made. The only office of the receipt was to acknowledge the payment of the premium as required by the terms of the policy, and avoid the effect of the condition forfeiting the insurance for non-payment of the premium : *New England F. & M. Ins. Co. vs. Wetmore*, 32 Ill., 221; *Herron vs. Peoria M. & F. Ins. Co.*, 28 Ill., 235.

This view will also dispose of appellee's contention that the parol evidence offered and excluded, as before mentioned, would have the effect to alter or vary a contract in writing, and was therefore inadmissible. The receipt, with evidence of contemporaneous acts and declarations, should go to the jury under proper instructions as to the weight and effect to be given thereto.

After what has been said, no extended discussion of the instruction complained of will be required, as no doubt upon another trial they will be made to conform to the views here expressed.

The first and second instructions given for appellee informed the

jury in substance that, if, after the assured was engaged as a brakeman on the trains of a railroad, the appellant company, with notice of that fact by its agents, wrote the letter of May 1, and afterwards notified the assured to pay the premiums on his policy, and collected and received the premiums thereafter accruing, and gave assured the receipt mentioned, with knowledge that assured was so engaged and employed, then the jury would be justified in finding that the appellant company by its acts had waived the forfeiture provided for in said policy in case of such employment, thereby in effect instructing the jury that the acts and declarations enumerated as a matter of law, estopped the company, whether the assured had been misled to his injury thereby or not, or whether or not he had been induced by the acts and declarations of the company to pay the premium, alter his position in respect to the insurance, or take or neglect to take some other action in relation thereto to his prejudice, relying upon the policy as valid and binding while he was so employed. These instructions in this respect were erroneous.

For the errors indicated the judgment of the appellate and circuit court will be reversed, and the cause remanded to the Circuit Court of Peoria County for further proceedings.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

KYTE

vs.

COMMERCIAL UNION ASS'N CO.*

A conveyance of the premises by the wife of the insured (in which he joined) to a third person, who simultaneously conveyed the same to the insured, the purpose being to vest in him a tax title to the premises which had been purchased by the wife, is not such a "sale" as will avoid the policy.

Where a policy provides that its conditions shall only be waived by the written or printed consent of the company, a local agent having authority only to receive premiums and issue policies cannot bind the company by an oral waiver of such conditions; as where the local agent was at the same time chairman of the board of selectmen of a town, and as such issued to the insured a license for the sale of intoxicating liquors, assuring him that it would not effect the policy during its life, but that he could not let him have another at the same rates.

Contract upon two policies of insurance, each for three years, made by the defendant corporation, and issued to the plaintiff, Lawrence Kyte,—one on January 24, 1881; the other, April 2, 1881. The property covered by said policies was located in the town of Natick, in this commonwealth,—one covering property described therein as "his two and one-half story, frame dwelling-house, situate on the south side of East Central Street, Natick, Mass.,—permission for carpenters to finish said building;" and the other policy covering property described therein as "his new, frame barn and shed attached, situate about thirty-five feet in rear of dwelling-house, on the south side of Central Street, Natick, Mass." Both policies were, in form, what is known as the "Massachusetts Standard Policy," and form and conditions complied with section 139 of chapter 119 of the Public Statutes of Massachusetts. At the trial in the superior

* Decision rendered, February 24, 1887.—From *Northeastern Reporter*.

court, before Rockwell, J., two deeds were offered by the plaintiff to prove his title to the premises,—one a deed of the premises from one Bridget Sweeney, of date February 19, 1876; and a deed from one Daly, of date May 25, 1880. It also appeared that at the time said policy was placed, as well as at the time of the loss by fire, said Kyte was a married man, and had four minor children, his wife's name being Joanna Kyte; that sometime after said Kyte received the first deed referred to, said premises were sold for taxes to William Nutt, and said Nutt deeded the same to said Joanna, by quit-claim deed of his interest, by deed dated April 19, 1879,—said Nutt testifying that the consideration of said deed, \$21, was paid by said Lawrence, July 27, 1881, said Joanna, in consideration of one dollar, deeded said premises to John P. Kyte, and said John P. Kyte, by deed of same date and same consideration, deeded said premises to Lawrence Kyte. Counsel for the defendant asked the court to instruct the jury relative to said conveyance as follows: "If you find that after the date of these policies, and before the occurrence of the fire, this property was sold or conveyed by deed, without the consent of the defendant company, then the plaintiff Kyte is not entitled to recover." The court declined to give this instruction, but instructed the jury, among other things, that, if the purpose of the conveyance was to vest the entire interest in the plaintiff, it was not a violation of the terms of the policy. The building described in the first policy contained, when completed, sixteen rooms, one of which was finished and furnished by the plaintiff as a bar-room. A sign, with the words "Centennial House," was also placed on the side of the building. The plaintiff, during the latter portion of the time, between January 24, 1881, when the first policy was issued, and November 16, 1883, when the fire occurred, had a common victualer's license, but had no license for the sale of intoxicating liquors until July 10, 1883. In April, 1882, a stock of intoxicating liquors was seized in said building, and after a hearing was forfeited, and in April, 1883, and in June, 1883, plaintiff was convicted of selling intoxicating liquors in said building, and subsequently paid costs of the court in the cases against him. The defendant offered evidence that it was the custom among fire insurance companies doing business in Massachusetts to charge a higher rate of premium for insurance on a building occupied by a person engaged in the business of selling intoxicating liquors; and the plaintiff introduced the evidence of one Blaney, the agent of defendant, through whom the policies were procured, that he (Blaney) consented to the plaintiff's using the building for the sale of liquors

under his policies, but said he should charge a higher premium when the policies expired. It also appeared that on August 31, 1881, the said dwelling-house, and the land on which same stood, were mortgaged by said plaintiff to Charles Q. Tirrell; and upon the same day the first-mentioned policy was issued by defendant's agent, Blaney, who it was admitted had authority to assent to said indorsement, "Payable, in case of loss, to Charles Q. Tirrell, mortgagee, as his interest may appear." The jury found for plaintiff, and the defendant alleges exceptions. Other facts appear in the opinion.

POWERS & POWERS, for Defendant.

The conveyance by deed of this estate by the plaintiff, Lawrence Kyte, and his wife, Joanna Kyte, was a sale within the meaning of the clause in the policy providing that "this policy shall be void * * * if without such assent [the written or printed assent of the company] said property shall be sold." *Mulville vs. Adams*, 19 Fed. Rep., 887, 892; *Langdon vs. Minnesota Mut. Fire Ins. Co.*, 22 Minn., 193; *Farmers' Ins. Co. vs. Archer*, 36 Ohio St., 608; *Savage vs. Howard Ins. Co.*, 52 N. Y., 502; *Baldwin vs. Phoenix Ins. Co.*, 60 N. H., 164; *Footte vs. Hartford Fire Ins. Co.*, 119 Mass., 259; *Dailey vs. Westchester Fire Ins. Co.*, 131 Mass., 173; *Oakes vs. Manufacturers' F. & M. Ins. Co.*, id., 164.

At the date of this conveyance to John P. Kyte, the plaintiff's sole interest in the property was that of tenant by the curtesy. His title, derived from deeds by two of the heirs, Bridget Sweeney and Daly, had been barred by the tax deed given to William Nutt, since more than two years had elapsed without redemption from the sale for taxes: Pub. St., c. 12, § 49. And the plaintiff's payment of the consideration to Nutt did not raise even a resulting trust in favor of himself: *Edgerly vs. Edgerly*, 112 Mass., 175; *Cormerais vs. Wesselhoeft*, 114 Mass., 550. Thus the deed of July 27, 1881, conveyed the plaintiff's entire interest to John P. Kyte.

Neither the insurance company nor its local agent assented to, or had knowledge of, this conveyance, and the instruction to the jury that they might consider its purpose was erroneous. It was competent for the parties to contract that a sale without assent of the company should avoid the policy. The sole question for the jury upon this point was one of fact, and not of purpose. The local agent, Blaney, had no authority to waive that condition in the policy which required the written or printed assent of the company to any change of circumstances or situation increasing the risk.

It would seem to be the law in this commonwealth that, where an insurance policy provides the manner in which its terms and conditions shall be waived, it is to be regarded as a reasonable limitation, and only the manner prescribed will be effectual. And this rule of law is not limited to Massachusetts: *Worcester Bank vs. Hartford Fire Ins. Co.*, 11 Cush., 265, 268; *Hale vs. Mechanics' Mut. Fire Ins. Co.*, 6 Gray, 169; *Baxter vs. Chelsea Mut. Fire Ins. Co.*, 1 Allen, 294; *Lee vs. Howard Fire Ins. Co.*, 3 Gray, 583; *Mulrey vs. Shawmut etc. Ins. Co.*, 4 Allen, 116; *Carpenter vs. Providence Washington Ins. Co.*, 16 Pet., 495, 512; *Walsh vs. Hartford Fire Ins. Co.*, 73 N. Y., 5, 10; *Sandford vs. Handy*, 23 Wend., 260.

And, in those cases where the strictness of this rule has been somewhat relaxed, a local or even a general agent cannot waive a condition in the policy requiring the written or printed assent of the company, unless it is shown that he had the express authority of the company, or that the company has so ratified similar acts of the agent as to justify the insured in believing that the agent possesses this authority: *Walsh vs. Hartford Fire Ins. Co.*, 73 N. Y., 5, 10; *Van Allen vs. Farmers' Joint-stock Ins. Co.*, 64 N. Y., 469; *Bush vs. Westchester Fire Ins. Co.*, 63 N. Y., 531; *Lohnes vs. Insurance Co. of North America*, 121 Mass., 439; *Clevenger vs. Mutual Life Ins. Co.*, 2 Dak., 114, 3 N. W. Rep., 313; *Harrison vs. City Fire Ins. Co.*, 9 Allen, 231; *Stringham vs. St. Nicholas Ins. Co.*, 4 Abb. App. Dec., 315; *Mentz vs. Lancaster Fire Ins. Co.*, 79 Pa. St., 475; *Catoir vs. American etc. Co.*, 33 N. J. Law, 487; *Shuggart vs. Lycoming Fire Ins. Co.*, 55 Cal., 408; *Mersebau vs. Phoenix etc. Ins. Co.*, 66 N. Y., 274; *Willcuts vs. Northwestern Mut. Life Ins. Co.*, 81 Ind., 300, 309; *Knickerbocker etc. Ins. Co. vs. Norton*, 96 U. S., 234; *Lynn vs. Burgoyne*, 13 B. Mon., 400; *Tate vs. Citizens' Mut. Fire Ins. Co.*, 13 Gray, 79; *Insurance Co. vs. McLanathan*, 11 Kan., 533.

Since the policy contained this restriction upon the power of the agent, which was well known to the plaintiff, the burden of proof was upon him to show that the local agent, Blaney, had authority to waive this clause by oral agreement. Such authority could not be presumed as a matter of law: 2 Wood, *Fire Ins.*, § 423.

R. D. SMITH and C. Q. TIRRELL, *for Plaintiff.*

The action being brought by Lawrence Kyle for his own benefit, and for the benefit of the mortgagee, and it being admitted that the policy was properly made payable to the mortgagee, and this duly assented to by the defendant, changes in occupancy would not affect

said mortgagee's interest, and as to his claim, no defense appears in the bill of exceptions: *Pub. St., c. 119, § 139.*

A sale by one partner to his copartner, and a mortgage back of the seller's share of the partnership property, is not a breach of the condition of the policy relative to a sale without the written assent of the insurer: *Powers vs. Guardian Fire & Life Ins. Co., 136 Mass., 108.* Even expenditures on another man's house give an insurable interest: *Looney vs. Looney, 116 Mass., 286.* Insurance on a building or leased land, as the property of the insured, has been declared good: *Fowle vs. Springfield Ins. Co., 122 Mass., 191.* See *Walsh vs. Fire Ass'n of Philadelphia, 127 Mass., 383.* An insurable interest may exist without any legal title in the property: *Williams vs. Roger Williams Ins. Co., 107 Mass., 377; Carter vs. Humboldt Ins. Co., 12 Iowa, 287; Insurance Co. vs. Stinson, 103 U. S., 25.* A husband may insure as his own property in which he is tenant by the curtesy, and he has a right to the amount of the insurance in case of loss: *Insurance Co. vs. Drake, 2 B. Mon., 47; Harris vs. York Ins. Co., 50 Pa. St., 341.*

The instruction requested, relative to the illegal keeping or sale of intoxicating liquors, was rightly refused. First, because it was too broad; an illegal keeping or sale of intoxicating liquors on one occasion only, under the ruling requested, would render the policy void. But a temporary illegal use of property does not prevent a policy from reviving after such use has ceased: *Hinckley vs. Germania Fire Ins. Co., 140 Mass., 38, 1. N. E. Rep., 737; Rafferty vs. New Brunswick Ins. Co., 18 N. J. Law, 480.*

The authority of a local insurance agent was not in controversy. It was immaterial whether the agent had or had not authority to waive the terms and conditions of a policy, unless the jury were instructed that such waiver would authorize the use of the premises as claimed by the defendant. The instructions were properly refused, (1) because they were not an issue in the case; (2) because they were immaterial; (3) because the defendant was not prejudiced by the refusal. No exceptions to immaterial evidence are allowable: *Williams vs. Taunton, 125 Mass., 34.* It must be shown, not only that the judge erred, but that the error was prejudicial to the party who takes the exceptions: *Fuller vs. Ruby, 10 Gray, 288.* Nor can exceptions to immaterial evidence be sustained, unless it is shown that the defendant is in some way prejudiced thereby: *Warner vs. Jones, 140 Mass., 216-218, 5 N. E. Rep., 645; Wing vs. Chesterfield, 116 Mass., 353.* The instructions were not required by the circum-

stances under which the case was presented to the jury, and were not pertinent to the issue: *Wilson vs. Lawrence*, 139 Mass., 320, 1 N. E. Rep., 278; *Chandler vs. Jamaica Pond Aq. Co.*, 125 Mass., 544.

DEVENS, J.

There does not appear to have been any misrepresentation of his title by Kyte when he received his policy. Whatever may have been the effect of the sale of the land for taxes, he was certainly tenant by the curtesy, and this was sufficient to give him an insurable interest: *Williams vs. Roger Williams Ins. Co.*, 107 Mass., 377; *Harris vs. York Ins. Co.*, 50 Pa. St., 341.

The instruction of the presiding judge that if the purpose of the conveyance by his wife, Joanna, in which he joined as tenant by the curtesy, was to vest the entire interest in the plaintiff, it was not a violation of the terms of the policy, had reference to the transaction as it had been described. The evidence showed this to have been a transfer of a tax-title interest by Joanna, the wife of the plaintiff, through a third party, to him. The seizin of this third party, John P. Kyte, was instantaneous only, and he was merely a conduit through whom the full title was to be passed to Lawrence. To hold the conveyance by Joanna Kyte, Lawrence assenting to and joining in it, as a sale within the clauses of the policy which avoid it, if without the written or printed assent of the company the "property shall be sold," would be to construe it too strictly, and to attribute to it a meaning which it was not intended to bear. The plaintiff would be therefore entitled to recover upon the second count, which was upon the policy on the barn, if the verdict was not for an entire sum, as there is no suggestion that this was vitiated, unless by the conveyance referred to.

In regard to the policy upon the house, another question is presented. The defendant had offered evidence that the premises were used by the plaintiff during the time covered by the policy for the illegal sale of intoxicating liquors, and requesting a ruling that, if this was the case, the plaintiff could not recover. This ruling was refused, and the exception thereto is not now insisted on. The jury was in this connection instructed that, if there was such a change in the use of the house and the manner of its occupation (it having been insured as a dwelling-house) as to increase the risk, without the knowledge of the defendant, that this would affect the policy. The plaintiff then offered the evidence of Alexander Blaney, the local agent of defendant, and chairman of the selectmen of Natick,

that the plaintiff had, during the time covered by the policy, received a victualer's license, and one to sell spirituous liquors of all kinds; and that he informed plaintiff, on granting the license, that he could continue under the policies of insurance as they then existed, although he would have to charge him more the next time. The plaintiff as well as Blaney testified as to the conversation, as stated in the charge of the learned judge, that at the time of obtaining the license as a victualer and also to sell liquor, or at some other time, it was agreed that this would not affect anything during the life of the policy, but that Blaney would not give another policy on the same terms. Upon this evidence the defendant requested the court to instruct the jury, in substance, that a local agent, with authority to receive premiums and issue policies, had no authority, as such, to waive the terms and conditions of the policy, or to waive the condition in the policy which required the written or printed assent of the company to any change in circumstances or situation increasing the risk. To these instructions the defendant was entitled. They correctly state the law, and were called for by the evidence. An agent to receive premiums and issue policies is not, independently of any evidence showing that he has a much larger authority than this, empowered to waive conditions so important that parties have seen fit to incorporate them into their contract. Some additional evidence must be offered, as that he had been held out by the company as possessing such authority, or that the company had so ratified similar acts, or so conducted itself, in regard to his other transactions, that the insured was justified in believing that he had: *Tate vs. Citizens' Mut. Fire Ins. Co.*, 13 Gray, 79; *Harrison vs. City Fire Ins. Co.*, 9 Allen, 231; *Lohnes vs. Insurance Co. of North America*, 121 Mass., 439. Nor, even if the agent had the fullest authority, could the conditions of the policy be waived other than in the manner in which they provide for such waiver. The company, which has seen fit to prescribe that the terms and conditions of its policy shall only be waived by its written or printed assent, has prescribed only a reasonable rule to guard against the uncertainties of oral evidence, and by this the insured has assented to be bound: *Hale vs. Mechanics' Mut. Fire Ins. Co.*, 6 Gray, 169; *Worcester vs. Hartford Fire Ins. Co.*, 11 Cush., 265. Upon this point the case was submitted by the learned judge to the jury only upon the question whether the plaintiff acted in good faith. This was erroneous, for the plaintiff might have acted in entire good faith, and honestly believed that his change of occupation of the premises in-

was justified, upon the oral permission of an agent without authority for any such purpose, and yet by such change have concluded so as to avoid his policy.

appears by the exceptions that on August 31, 1881, the premises were mortgaged to C. Q. Tirrell, but for how much does not appear; the policy was indorsed by defendant's agent Blaney, who it admitted had authority for that purpose, "payable, in case of loss to Charles Q. Tirrell, mortgagee, as his interest may appear."

The writ and pleadings are not made part of the exceptions, but it appears thereby that the action is brought by the plaintiff for his own benefit and that of the mortgagee. The plaintiff contends that no change in the occupancy would affect the mortgagee's interest, and therefore, as to this claim, no defense whatever is shown on the terms of the policy; when made payable to a mortgagee, no loss or default of any person other than such mortgagee or his agents, etc., "shall affect such mortgagee's right to recover in case of loss on such real estate." But we cannot, upon this argument, hold the exceptions to be immaterial. No such question as this was passed on by the presiding judge. Apparently the case was argued as if the plaintiff was the only party interested, and the exceptions do not show, and were not intended to show, the relation of the mortgagee, either to the plaintiff or the defendant. It was suggested at the trial that the mortgagee had any independent right to recover, nor can we say what might have been the course of the trial if he had sought to establish any such right. The questions that might arise, should he undertake to do so in this case, it would not be profitable to determine, or even discuss, in advance.

As to the second count the exceptions are overruled; as to the first the exceptions are sustained. As the verdict is for one sum on both counts, it must be set aside, and a new trial ordered.

SUPREME COURT OF APPEALS OF VIRGINIA.

HOME INS. CO.

vs.

GWATHMEY AND OTHERS.

The policy limited its liability to loss affecting the interest of the insured and provided that goods on storage must be separately and specifically insured. The policy was on merchandise their own, or held by them in trust or on consignment, or sold but not delivered, and insured against all loss * * not exceeding the interest of insured. Goods on storage by the insured warehousemen were separately and specifically insured by other insurance obtained by the depositors.

Held, That the policy was not liable for goods on storage in which the insured had no interest, and there could be no contribution with the insurers of such goods.

TUNSTALL & THOM, *for Plaintiffs in Error*.

WALKE & OLD, *for Defendant in Error*.

LACY, J.

This is a writ of error to a judgment of the corporation court of the city of Norfolk, rendered on the third day of August, 1885. The action is upon a policy of insurance by the assured, commission merchants and licensed warehousemen, for the benefit of owners of merchandise on storage in their warehouse, and destroyed by fire. The said depositors had other insurance of their own, taken out by them, to cover, and more than covering, the entire value of all the goods stored by them in the warehouse; but their insurers, claiming that as the said warehousemen had insurance on their warehouse, and their own goods therein, greater than the value of their own losses, the insurers of the said warehousemen, of whom the appellant company is one, were compellable to ratably contribute to the losses of the said depositors; and upon that ground refused to settle in full

* Decision rendered, February 17th, 1887.

with the said depositors for their losses until they had exhausted their legal rights and remedies against the appellant company and others, the insurers of the warehousemen. The appellant company having refused to recognize any such demand upon them, the suit was brought by the warehousemen, upon the requisition, for the benefit and at the costs of the said depositors, disclaiming for themselves all of their losses by the fire, and all of their own claims under the policy sued on having been paid. The case was tried in the said corporation court of Norfolk City, and judgment was rendered for the plaintiffs, for the benefit of the depositors, against the appellant company, for their due contributory rate, upon the principle that they were bound for contribution, the insurance being double upon the goods destroyed, and greater than their entire value. From the judgment the case is here by writ of error.

The whole question here is upon the construction of the policy sued on. The principles of interpretation applicable to contracts of insurance are the same as those which obtain in the case of other contracts. The same rule of construction which applies to other instruments applies also, to these. They are to be construed according to the sense and meaning of the terms used, and, if these are clear and unambiguous, parol evidence will not be admitted to contradict, vary, or to explain them. Their terms are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade, acquired a peculiar sense, distinct from the popular sense, rendering it necessary to resort to extrinsic proof in order to determine in which sense they are used, and so to explain their ambiguity; or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some special and peculiar sense: *Lord Ellenborough, in Robertson vs. French, 4 East., 135.*

As was said by Lord Abinger in *Cornfoot vs. Fowke* (6 Mees. & W., 358): "A policy of insurance is a contract, and is to be governed by the same principles as govern other contracts. Its language is to receive a reasonable interpretation. Its intent and substance, as derived from the language used, should be regarded." There is no more reason for claiming a strict, literal compliance with its terms than in ordinary contracts. Full legal effect should always be given to it, for the purpose of guarding the company against fraud and imposture. Beyond this, we would be sacrificing substance to form; following words rather than ideas: *Nelson, C. J., in Turley vs. North*

American Fire Ins. Co., 25 Wend., 374. Indeed, a moment's reflection will render it apparent, says a learned writer, that there is nothing about an agreement about insurance intrinsically more sacred or inviolable than in an agreement about any other subject-matter.

In a case in the Supreme Court of the United States, much relied on in the argument here, the learned justice who delivered the opinion of that court said on this subject: "The most important question in this case relates to the proper construction of the defendant's policy of insurance. It is contended on their behalf that it covered only the warehouse company's interest in the goods contained in the warehouse." "Blanket and floating policies are sometimes issued to factors or warehousemen, intended only to cover margins uninsured by other policies, or to cover nothing more than the limited interest which the factor or warehouseman may have in the property which he has in charge. In those cases, as in all others, the subject of the insurance, its nature and extent, are to be ascertained from the words of the contract which the parties have made." It is true of policies of insurance, as it is of other contracts, that, except when the language is ambiguous, the intention of the parties is to be gathered from the policies alone. There are cases in which resort may be had to parol evidence to ascertain the subject insured, but they are cases of latent ambiguity; so, in the construction of other contracts, parol evidence is admissible to explain such ambiguities. In this particular the rule for the construction of all written contracts is the same. Lord Mansfield said, long ago, that courts are always reluctant to go out of a policy for evidence respecting its meaning: *Loraine vs. Tomlinson*, 2 Doug., 585; *Astor vs. Insurance Co.*, 7 Cow., 202; *Murray vs. Hatch*, 6 Mass., 465; *Levy vs. Merrill*, 4 Greenl., 180; *Insurance Co. vs. Loney*, 20 Md., 36; *Arnould, Ins.*, 1,316, 1,317; 2 Greenl. Ev., 377; *Home Ins. Co. vs. Baltimore Warehouse Co.*, 93 U.S., 527. But there are cases where resort is necessary to parol evidence, to ascertain to whom the terms of the policy apply; as, when the policy is for or on account of the owner, or on account of whomsoever it may concern, evidence beyond the policy is then received to show who are the owners, or who were intended to be insured thereby. In such cases the policy fails to designate the real party to the contract, and, without resort to extrinsic evidence, there is no contract at all: *Home Ins. Co. vs. Baltimore Warehouse Co.*, *supra*; *Finney vs. Bedford Com. Ins. Co.*, 8 Metc., 348.

Let us look, then, to the terms of the contract now here drawn in question. This policy provides that, "by this policy of insurance,

the Home Insurance Company, of New York, do insure W. W. Gwathmey & Co., against loss or damage by fire, to the amount of five thousand dollars, on cotton in bales and general merchandise, their own or held by them in trust or on consignment, or sold but not delivered, contained in the brick, metal-roof building known as 'Gwathmey's Warehouse,' situate on the south side of Water Street, and known as 'Town Point,' in Norfolk, Virginia. Other concurrent insurance permitted. And the said Home Insurance Company hereby agree to make good unto the said assured, his executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum or sums insured as above specified, nor the interest of the assured in the property, except as herein provided, as shall happen by fire," etc.

Among the conditions attached, and constituting a part of the policy, is the following provision: "Goods held on storage must be separately and specifically insured." In accordance with this last provision, the goods on storage were separately and specifically insured by other insurance obtained by the depositors. This specific insurance was more than sufficient to pay in full all losses incurred by the said depositors. The insurers, however, of these goods on storage, refused to pay the losses of said depositors, unless and until the insured brought suit against insurers of the warehousemen, and exhausted against them their legal rights, if any, to have contribution from them; claiming that the general words of the policy cited above, "goods in trust," etc., entitled the depositors to share in the benefits of the insurance obtained by the warehousemen, upon the authority of the case of *Home Ins. Co. vs. Baltimore Warehouse Co.*, supra. In that case, which we have already considered at some length, Justice Strong said, speaking for the court: "Turning, then, to the policy issued to the plaintiff below, and construing it by the language used, the intention of the parties is plainly exhibited." "Its words are, 'insure Balt. Warehouse Co. against loss or damage by fire, on merchandise, their own or held by them in trust, or in which they have an interest or liability, contained in' a certain described warehouse. There is nothing ambiguous in the description of the subject insured. It is as broad as possible. The subject was merchandise contained in a certain warehouse. It was not merely an interest in that merchandise. The merchandise of the warehouse company owned by them was covered, if any they had. So was any merchandise in the warehouse in which they had an interest or liability, and so was any merchandise which they held in trust. The description

of the subject must be entirely changed before it can be held to mean what the insurers now contend it means. If, as they claim, only the interest which the warehouse company had in the merchandise deposited in their warehouse was intended to be insured, why was that interest described as the merchandise itself? Why not as the assured's interest in it? And, again, the 'insurance company agreed to make good all loss,' etc., 'to the property as above specified.' Nowhere is any less interest in the goods insured alluded to than the entire ownership."

This case was argued in the supreme court, October 25 and 26, and decided November 20, 1876. The policy in question here was issued December 16, 1884. The Home Insurance Company seems, in the interval of eight years elapsing, to have profited by the teachings in that case; for it cannot be said of this policy, as was said of the policy in that case, "Why not as to the assured's interest in it?" nor can it be said of this, "Nowhere is any less interest in the goods insured alluded to than the entire ownership;" for, as we have said, it contains these words: "Not exceeding in amount the sum or sums insured as above specified, nor the interest of the assured in the property," etc. And, as if to make the matter sure, the words, "goods held on storage must be separately and specifically insured," are also added to the policy. In this case the depositors, not relying upon the warehousemen's insurance, did, specifically and separately, amply secure themselves as to their own goods, and make no contention here, except as required by their insurers for contribution; and it was offered by the defendant company in the court below to prove that such was the understanding all around, that the warehousemen did not undertake to insure their depositors, nor did the depositors understand or claim that they were in any wise concerned in the insurance in question; but all this evidence was excluded by the trial court, which instructed the jury as follows: "The court instructs the jury that the insurance taken out by the said W. W. Gwathmey & Co. (the warehousemen), under their policies given in evidence, after deducting therefrom the loss of the said W. W. Gwathmey & Co., constituted double insurance, and was liable to contribute to the losses sustained by Battle, Bunn & Co. and Everett Bros., Gibson & Co., the depositors," etc.

"Double insurance" may be defined to be additional and valid insurance, prior or subsequent, upon the same subject, risk, and interest effected by the same insured, or for his benefit, and with his knowledge and consent; but owners of different interests in the

same property may respectively insure their interest without risk of violating a provision against other insurance: *Tyler vs. Ætna Fire Ins. Co.*, 12 Wend., 507, 16 Wend., 387; *Sloat vs. Royal Ins. Co.*, 49 Pa. St., 14; *Forbush vs. Western Mass. Ins. Co.*, 4 Gray, 337. In the case of *Parks vs. General Interest Assurance Co.* (5 Pick. 34) it was held that the assured might himself, by the representations made to the insurers, restrict their liability to his actual interest in the property; as when the plaintiff procured a policy on goods held by him in trust, and represented to the insurers that he was receiving goods for sale, on which he made advances, and that the consignors might not be able to repay the same, and that he wished for a policy to secure himself from loss by fire thereon, it was held that the policy only covered the assured's interest therein. So, a policy may be issued to and for the benefit of whom it may concern, or as the property may appear; and any person who had an insurable interest therein at the time of the loss, and whose interests were intended to be covered by the policy, may recover thereon: *City Bank vs. Adams*, 45 Me., 455; *Rogers vs. Traders' Ins. Co.*, 6 Paige, 583; *Steele vs. Insurance Co.*, 17 Pa. St., 290; *Finney vs. Bedford Com. Ins. Co.*, 8 Metc., 348.

For the decision of this case we are only to recur to the general principles stated above. The policy is to be construed according to its terms. Where these are plain and clear and unambiguous, there is no occasion whatever to resort to other evidence to ascertain its meaning; in other words, to ascertain and define the contract between the parties. From the plain words of this policy, can there be any difficulty to determine the questions involved? The policy limits its liability to the loss affecting the interest of the assured, not to exceed the sum agreed on as the amount of the policy, and not to exceed the interest of the assured. This the appellant company has promptly and fully paid. Can they, the said appellants, be held responsible for goods on storage in which the assured had no interest? Again, the policy responds in plain terms, "Goods on storage must be separately and specifically insured." The depositors followed and obeyed this requirement, and did insure the goods on storage separately and specifically, but not in this company. They paid their premiums to other companies, and insured their goods on storage with them. These companies claim to have contribution of the appellant company, upon the ground of double insurance; that is, that the policy of the appellant company extended to a greater interest in the goods in the warehouse than

the interest of their insured, and extended to goods on storage, and constituted double insurance. This cannot be maintained, unless the court can make a contract for the parties. If we are to confine our action to the enforcement of the contract as made by the parties themselves, there can be no contribution in this case; there is no double insurance. The appellant company has discharged every obligation growing out of their contract, and were entitled to be dismissed out of the corporation court of Norfolk, with their costs.

The court below erred in instructing the jury that the insurance was double upon the goods on storage, and rendering judgment against the defendant for any amount, and the said judgment will be reversed with costs, and a judgment rendered here dismissing the suit at the costs of the plaintiffs, which will be certified to the said corporation court of Norfolk City.

COURT OF APPEALS OF MARYLAND.

Appeal from the Circuit Court for Washington County.

PLANTERS' MUT. INS. CO.)

vs.

ROWLAND.*

The policy on a flour-mill provided that it should be void if the property be so altered or appropriated or used as would increase the risk according to the annexed schedule, without the company's consent indorsed.

Held, That an alteration which would increase the hazard according to the schedule would ipso facto forfeit, but an alteration of the machinery from the burr process to the roller process, not being referred to in the schedule, would not come within the provision.

There was an indorsement on the back of the policy, that in case of proposed alteration to the property application should be made to the secretary or agent, who on examination should certify whether the risk would be increased.

Held, That when no reference is made to such indorsement in the policy, it would be merely directory and not obligatory, being no part of the contract, especially where no provision for forfeiture in case of violation is made.

The by-laws required notice to be given to the secretary in case the property was rendered more hazardous, and that the directors might elect to continue upon the same or higher terms or to cancel.

Held, That verbal notice to the general agent who stated that it was all right and that the company had decided that such a change was no increase, was sufficient.

The lessee, who introduced new machinery, insured it and assigned the policies to the insured as security for money loaned.

Held, That this was not double insurance.

Held, That possession by lessees with a privilege of buying was not an alienation of title or interest by the lessor.

Rates of insurance are evidence for a jury as to increase of risk, though not a decisive test.

EDWARD STAKE and HENRY KYD DOUGLAS, *for Appellant.*

I. CLARENCE LANE, *for Appellee.*

* Decision rendered, December 18, 1886.

ROBINSON, J.

The property insured in this case was a flour and fertilizer mill belonging to the appellee. After the policy was issued, the appellee leased the mill to the Messrs. Aiken & Sons for five years, with the privilege on their part to make "alterations and to refit the mill with other or new machinery," upon the condition, however, that they should, upon the expiration of the tenancy, replace the old machinery. The Messrs. Aikens entered into possession under the lease, and finding it desirable to change the machinery, they took out so much of the old machinery as was used for the manufacture of flour by the burr process, and substituted therefor the roller process. This was done at their own expense, and the new machinery being their property under the terms of the lease it was insured by them. About two years afterward the mill was destroyed by fire, and this suit is brought by the appellee to recover the loss sustained by him.

To this action several defenses are set up by the appellant. In the first place it is contended that the alteration in the machinery, without the consent of, or notice to, the company, whether increasing the risk or not, per se avoided the policy. If this be so, it must be by reason of some stipulation between the parties; for, unless restricted in some way by the policy, we take it to be well settled that the insured may make alterations in the property without notice to insurer, provided such alterations do not thereby increase the risk. So the question resolves itself into this, is there any stipulation in the policy or by-laws, which forfeits the policy upon the failure on the part of the appellee to give notice to the company of the alterations in the machinery, although such alterations did not increase the risk? The policy does provide that it "shall cease and be of no effect" if the property shall be so altered, or appropriated, or used for the purpose of carrying on therein any trade or business which, according to the class of hazards thereto annexed, would increase the risk unless it be by the consent of the company, in writing, indorsed upon the policy. This provision is one usually to be found in fire policies, and there ought not, it seems to us, to be any difficulty in its construction. The property here insured was a flour-mill, and the rate of insurance was fixed and paid according to the risk incident to that business. The insurer assumed this and no other risk, and if the appellee proposed so to alter the mill, or to use it for the purpose of carrying on any trade or business which, according to the class of hazards annexed to the policy, would increase the risk, he was bound to get the consent of the company,

in writing, indorsed upon the policy. Without such consent the alteration or use ipso facto avoided the policy. The question as to the increase of risk was no longer an open question, because the parties had by their agreement made such alterations or use material: *Kimberley's case*, 34 Md., 224; *Lounsbury's case*, 9 Com., 456; *Diehl's case*, 59 Penn. St., 443; *Lee's case*, 3 Gray, 383.

The question then is, whether the alterations made by the appellee in the machinery were such as would, according to the class of hazards annexed to the policy, increase the risk. The class of hazards annexed to the policy is not to be found in the record, and we cannot assume as matter of fact, that the mere change in the machinery of the mill, from the burr process to the roller process, was such an alteration as would, according to the class of hazards annexed to the policy, increase the risk. On the contrary, the proof shows that the appellant had permitted other mill-owners to make this change without objection, and without increasing the rate of insurance. This provision, therefore, in the policy has not in our opinion any bearing upon the question.

But the appellant also relies upon an indorsement on the back of the policy to the effect that whenever any alteration is to be made in the property the insured shall make application to the secretary or agent, who shall examine the property, and certify whether the hazard be thereby increased or not, etc. Now an indorsement on the back of a policy may be regarded as part of the contract, provided it is referred to in the policy as constituting part of it. If, however, there be no reference whatever to it in the policy, nothing to show that the parties meant it to be a part of the contract, it will be regarded merely as the act of insurer, and not, therefore, binding on the insured: *Stone's case*, 34 N. J., 371; *Kingsley's case*, 8 Cush., 393; *Farrier's case*, 47 Vt., 416; *Linder's case*, 16 Wend., 481; *Bize vs. Fletcher*, Doug., 13, n. In this case there is no reference either in the policy or in the by-laws to the direction or indorsement on the back of the policy, and it cannot, therefore, be regarded as part of the contract. It is what it professes to be, merely directory, and not obligatory. And besides it does not provide for a forfeiture of the policy upon the failure on the part of the insured to make such application, and forfeitures are not favored by implication. We are of opinion, therefore, that there is no stipulation in this policy which per se avoids it upon the failure of the appellee to give notice to the company of the alteration in the machinery of the mill, provided such alteration did not increase the risk. Whether or not the risk

was thereby increased was a question which the court properly submitted to the finding of the jury.

And this brings us to the next, and the more important question. Assuming that the change in the machinery from the burr to the roller process did increase the risk, was notice given to the company as required by the tenth section of the by-laws? This section provides that if the property insured shall be rendered more hazardous, by any means within, or not within, the control of the insured, notice shall be given to the secretary; and the directors may elect either to continue the insurance upon the same terms, or at higher rates, or may cancel the policy. Nothing is said about written notice; all that is required of the insured is that he shall give notice to the proper officer of the company, and then the directors may elect.

Was notice then given by the appellee to the company of the alteration about to be made in the machinery? Now, what is the evidence? The appellee proved that, before the alteration was made, he gave notice of such alteration to Pole, the general agent of the company, its treasurer, and one of its directors, and as such duly authorized to receive risks and notices of alterations in the property; and that Pole stated to the appellee in reply that it was all right, that the company had determined that the alterations in the machinery as proposed did not increase the risk; that it had been so decided in the case of Kemp's mill, where the roller process had been substituted for the burr process; that no additional premium note was required of the appellee after the notice thus given, nor was any objection ever made that the alterations increased the risk, and that, nearly two years after such alterations, the board of directors levied an assessment on the premium note of the appellee, to meet losses sustained by the company, which assessment was paid. He further proved that Kemp, and Young, and Huyett, and Neikirk, all mill-owners, had made application to the appellee for permission to substitute the roller process for the burr process; that their several applications were granted, and granted without demanding any higher rate of insurance.

This evidence, if true, not only proves that notice was in fact given to the proper officer of the company, but it explains why no action was taken by the directors upon the application of the appellee. They had already decided, upon the application of other mill-owners, that the substitution of the roller process for the burr process did not increase the risk, and no further action, therefore,

was necessary. If the notice required by the by-laws was thus given, the question of waiver and estoppel becomes immaterial.

Passing, then, from this branch of the case, we come to the further defense that there was a double insurance on the property. Now, what are the facts relied on to support this defense? The mill was, as we have seen, leased to Messrs. Aikens for five years, and, while in possession of the mill, part of the old machinery was taken out by the lessors, and new and different machinery put in its place. This was done at their expense, and at a cost of about \$9,000. The new machinery which belonged to them was insured, and the policies of insurance were assigned to the appellee to secure the payment of \$2,000 loaned by him to the lessees. The appellee thus held, it is true, two policies, one on the mill and old machinery, property which belonged to him, and the other on the new machinery, which belonged to the Messrs. Aikens, but the two policies were in different rights, and upon different property. In no sense could this be considered a double insurance, to constitute which there must be two or more policies insuring the same property.

Then again it was said there was a forfeiture of the policy, because the appellee had parted with his interest in the property. But there is no ground on which this contention can be supported. He had leased the mill for a term of five years, with the privilege, on the part of the lessors, to buy it any time during lease at a price named. They did not agree to buy it, but merely had the privilege of buying it, and as matter of fact the record shows they never did buy it. They were in possession under the lease, but the title and right of property was in the appellee. It cannot be said that he had parted with his interest or that he had in any manner aliened it, within the meaning of the law: Phillips' case, 10 Cush., 350; Hill's case, 59 Penn. St., 474; Petney's case, 65 N. Y., 6; Washington Fire Ins. case, 32 Md., 421.

We see no objection to the rule of damages laid down by the court. The appellee was entitled to recover the full loss or damages sustained by him, to be estimated, in the language of the policy, according to the actual value of the property at the time of the fire, with interest thereon, in the discretion of the jury, after three months from the date of notice and proof of loss. And so the court instructed the jury.

The theory upon which the appellant's ninth prayer is based, namely, that the appellee had no such interest or property in the old machinery as would entitle him under the policy to recover for its

loss, because it was in the possession and under the control of the lessors of the mill, is clearly erroneous. The possession by the lessors in no manner affected appellee's right of property. It was still his property, and for its loss he was entitled to recover. It follows from what we have said, that there was no error in granting the appellee's prayers and in rejecting the several prayers offered by the appellant.

There were exceptions also taken to certain evidence offered by the appellee. In the first exception, the witness Clark testified that he was the general agent and inspector of the Hartford Insurance Company, and as such had made repeated examinations of hazards of burr and roller mills. He was then asked the following questions: "State, if you know, the usage of underwriters respecting the rates charged in burr flouring-mills and roller-mills; are the rates the same or different?"

One of the questions to be determined by the jury was whether the substitution by the appellee of the roller process in the place of the burr process had increased risk. The witness was not asked to give his opinion as an expert in regard to the risk, but to prove a fact, whether insurance companies charged the same or different rates on burr and roller mills. We do not mean to say that the rates of insurance are to be considered a decisive test as to the risk, but it was evidence to go to the jury to be considered in connection with other facts, in determining the question of increase of risk. And so with regard to the evidence offered in the second and third exceptions. The witnesses Clark and Rease were both experts and thoroughly acquainted with the practical working of the machinery used in the manufacture of flour by the burr and roller processes, and had knowledge of the details of the workings of each. They were then asked the following question: "State the physical conditions or facts in the operation of burr and roller flour-mills."

The jurors were not millers, nor experts in the manufacture of flour, and if they were to determine whether or not the hazard was increased by altering the mill from one process to another, they were entitled to the facts connected with the operation of both. *Joyce's case*, 45 N. Y., 274; *Lyman's case*, 14 Allen, 335; *Luce's case*, 105 Mass., 298. Judgment affirmed.

SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1886-87.

ALABAMA GOLD LIFE INSURANCE COMPANY

vs.

MOBILE MUTUAL INSURANCE COMPANY.*

Instruction to find for the company as a matter of law in case of alleged misrepresentation as to age is only proper where the evidence is clear and positive and without material conflict. But even in the absence of conflict such instruction would not be proper if the conclusion rested on an inference from which the jury might find the contrary.

Statements as to date of birth in proofs of death may be corrected. The burden of proving the falsity of the representation is on the company.

Instruction to find for the company should be given when there is insufficient evidence to prove a fact essential to recovery.

A policy taken out on the life of another in whom there is no insurable interest, or assigned to another having no such interest, is void.

The policy provided for its assignment subject to proof of interest.

Held, That where the assignment purports on its face to be a purchase, the burden of proving interest is on the assignee.

Action on policy of life insurance.

Messrs. OVERALL & BESTOR, *for Appellant*.

R. H. CLARKE, Esq., *Contra*.

CLOPTON, J.

The Alabama Gold Life Insurance Company issued, February 14, 1871, a policy of insurance in the sum of five thousand dollars on the life of James L. Steedman, payable to the assured or his legal representatives. On July 18, 1882, Steedman assigned the policy to

* Opinion filed, February 15, 1887.

Charles A. Holt, who was his creditor. The company, on request of Steedman and Holt, issued, July 23, 1883, in consideration of the surrender of this policy, a paid-up policy, being the one sued on, payable to Holt, "assignee, his executors, administrators, or assigns." The latter policy was assigned by Holt, during the life of the insured, to appellant, who brought the present suit, Steedman having died March 4, 1884. The defendant pleaded the general issue, and a special plea, alleging misrepresentation as to age and date of birth. The only error assigned is the refusal of the court to give, on request in writing, the affirmative charge in favor of the defendant. The right to such charge is based on two grounds; the absence of conflict in the testimony respecting age and date of birth, and the want of evidence showing an insurable interest.

If the only ground on which to rest the instruction, was the effect of the evidence relating to the issue of misrepresentation, there would be no error in its refusal. Such charge may be properly given, when the evidence is clear and positive, without conflict on any material point, and no evidence is offered by the other party affecting its credibility or accuracy. The mere want of conflict is not sufficient, unless only legal conclusions can be drawn. The affirmative instruction should not be given, though the evidence may be without conflict, and direct and positive, if it rests in inference, and the jury are authorized to make any deduction, or draw any inference, which would be fatal to the right of recovery, or to the defense, as the case may be: *Luke vs. Calhoun Co.*, 52 Ala., 115; *Fountain vs. Ware*, 56 Ala., 558.

The only witness who testified directly to the time of birth was Reuben Steedman, the father of the insured. His testimony was taken on interrogatories, to which was attached his ex parte affidavit, procured by the defendant shortly after the death of the insured, on the face of which it is apparent an alteration had been made in the figures designating the year of birth, and no explanation was offered, how, when, or by whom the alteration was made. Though his testimony is positive and direct, there is evidence that he was advanced in years, was infirm, and his memory was bad, and that no record was kept of the births of his ten children. The statement of the date of birth in the proof of death may be regarded as an admission, subject to be corrected or explained: *Conn. Life Ins. Co. vs. Schwenk*, 94 U. S., 593. Clover, who made the proof, testified to his want of information, the manner in which he arrived at the year of birth, and that it was inserted in the proof on demand of the

agent of the defendant, to whom he stated, at the time, he did not know the date of birth. The burden of proving the falsity of the representation is on the defendant: *Piedmont & Arlington Life Ins. Co. vs. Ewing*, 92 U. S., 377. The credibility and accuracy of the testimony, and its sufficiency, are matters for the determination of the jury. In determining these questions, they were authorized to consider the evidence relating to the physical and mental condition of the witness at the time of testifying, the circumstances under which he testified, and the explanation of the admission in the proof of death, and draw inferences in regard to the value and accuracy of the direct and positive evidence. The effect of the charge would have been to withhold from their consideration the explanatory, qualifying, and invalidating evidence, and to instruct them that, notwithstanding its truth, the testimony of the father and the admission in the proof of death were sufficient to overcome the presumption of the truth of the representation.

But such charge should be given when there is a want of evidence tending to prove a fact material to the right of recovery: *Tyroe vs. Lyon, Murphy & Co.*, 67 Ala., 1. There is no evidence of an insurable interest; and the question thus raised is, whether it is incumbent on the assignee of a policy of life insurance, the assignment having been made during the life of the insured, to show such interest, to entitle him to recover? The doctrine is well settled, that a policy of insurance taken out by one person on the life of another, in which he has no insurable interest, is repugnant to public policy and illegal. And though there is conflict in the authorities, it may be regarded as established by this court, that the assignment of a policy of life insurance to one having no expectation of benefit or advantage from the continuance of the life of the insured, founded on relations of blood, or marriage, or pecuniary—to one who is interested in his death rather than his life—is obnoxious to all the objections which exist to the issue of the policy originally to such person: *Helmetag vs. Miller*, 76 Ala., 183.

The policy sued on contemplates and provides in terms for an assignment. It is made payable to the assured, his executors, administrators, or assigns. After prescribing the mode in which it may be assigned, and requiring notice thereof to be filed with the company, it provides: "That any claim against this company, arising under this policy by any assignee, shall be subjected to proof of interest, and said assignee shall, in no event, receive from said company any amount in excess of the amount due said assignee at the

date of the maturity of this policy; the balance, if any, reverting to this company." The policy and the assignment constitute a contract, to which the plaintiff and defendant are parties, and by the terms of which the plaintiff stipulated, that the continuing validity of the policy should be conditioned on proof of interest, and that the recovery should be limited to the amount of such interest. But independent of these provisions, the assignee is required to prove each and every fact, which the assured, if plaintiff, would be required to prove in order to maintain an action on the policy; and the assured would be required to establish an interest in the subject insured, unless the statements of the policy are *prima facie* sufficient. The assignment, on its face, purports to be a purchase. In such case there is no presumption of an insurable interest. As without the possession of such interest, the policy on assignment becomes a wager-policy, though valid in its inception; the burden is cast by the plea of the general issue on the assignee to prove such interest, it being material and requisite to his right of recovery: *Greenhood on Public Policy*, 121, 238; *Singleton vs. St. Louis Mut. Ins. Co.*, 66 Mo., 63; *Canfield vs. Watertown Fire Ins. Co.*, 55 Wis., 419; *Ins. Co. vs. Diggs*, 8 Bax., 563.

It is contended, however, that the want of such interest is matter of defense, in avoidance of the policy, and under the statute must be specially pleaded. The statute provides, that "in all suits where the defendant relies on a denial of the cause of action as set forth by the plaintiff, he may plead the general issue, and in all other cases the defendant may briefly plead specially the matter of defense." Code, 1,876, § 2,983. The construction which the statute has received is, that the plea of the general issue casts on the plaintiff the onus of proving every material allegation of the complaint, and limits the defense to evidence in disproof; but matter in avoidance must be specially pleaded. It does not relieve the plaintiff from proof of any fact which is an essential constituent of his cause of action: *Petty vs. Dill*, 53 Ala., 641. At common law, in an action on a policy of insurance, the declaration must allege the plaintiff's interest in the subject insured. While the common-law rules of pleading have been modified, and in some aspects abrogated, by statute, and any pleading which conforms substantially to the prescribed forms is sufficient, the statutory forms are considered and treated as virtually containing, though in many instances by the averment of a legal conclusion, all the allegations of facts requisite to setting forth a good and valid cause of action which it is in-

cumbent on the plaintiff to prove, as if formally averred. There being no form of a complaint on a policy of life insurance, a complaint in such action is sufficient, if it conforms substantially to the statutory form on a policy of marine insurance, and in addition, when appropriate to the form of a complaint on a dependent covenant or agreement: *Brooklyn Life Ins. Co. vs. Bledsoe*, 52 Ala., 538.

When the suit is by the assured, the averment that the defendant insured against loss or injury, contained in the form of a complaint on a policy of marine insurance, is the equivalent prima facie of an averment of insurable interest: *Conn. Fire Ins. Co. vs. Capital City Ins. Co. (MSS.)*, Ala., Dec. Term, 1886-87. But it will not be so regarded when the action is brought by an assignee. In such case conformity to the form merely is not sufficient. Neither the statutory forms nor the statutory rules of pleading dispense with the allegations requisite to show a legal and substantial cause of action and a right to maintain the suit in his own name. Whether the averment that the policy is the property of the plaintiff is the equivalent of these allegations we do not decide, no objection being made to the complaint.

It is further insisted that by the twenty-ninth rule of practice in the circuit courts, the plaintiff is not required to prove an insurable interest, unless disputed by plea verified by affidavit. The rule provides that when an action is brought by an assignee or transferee of a contract for the payment of money, the defendant shall not dispute the interest of the plaintiff in such contract, and his right to maintain such action, except by a verified plea. The rule relates to a denial of the plaintiff's ownership or property in a contract, the validity or legality of which is not destroyed or affected by a transfer under whatever circumstances, or to whatever person made—where notwithstanding the transfer or assignment the contract continues in force. But where an interest or other thing is essential, on the happening of a contingency to preserve the legality of the contract, and to maintain it in force and effect, for instance, when a policy becomes illegal by its assignment unless supported by an insurable interest, the defendant is not required to deny the existence of such interest, which is to deny the legality of the contract by a verified plea. Whenever it appears that the contract sued on violates the law and public policy, and is in contravention of good morals, the court is compelled by the highest considerations to refuse to enforce it, and the objection cannot be obviated or waived by any rule of pleading: *Oscanyan vs. Arms Co.*, 103 U. S., 266.

Though the rule may operate to prevent the defendant to dispute the factum of the assignment, or the mere ownership of the plaintiff, except by a sworn plea, it does not operate to prevent the defendant to dispute the existence of the interest, on which the legality of the policy depends, without such plea. The difference consists in the distinction between ownership and legality. Were the policy assignable as any ordinary chose in action, though the assignee possesses no insurable interest, or had it been assigned after the death of the insured, the rule would have been applicable. But neither the statutory rule of pleading, nor the rule of practice exempts the plaintiff from proving any fact material and essential to a valid and legal contract.

From the principle that the policy is void unless the plaintiff has an insurable interest, the conclusion necessarily results that such interest is a constituent part, an essential element of the cause of action set forth in the complaint, and that the general issue casts on the plaintiff the burden and necessity of showing the possession of such interest. For the want of any evidence tending to prove this material fact, the affirmative charge should have been given.

Reversed and remanded.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1886.

In Error to the Circuit Court of the United States, Northern District of Illinois.

ACCIDENT INS. CO. OF NORTH AMERICA

vs.

LORETTA M. CRANDAL.*

The policy insured against "bodily injuries effected through external, accidental, and violent means within the intent and meaning of the contract and the conditions hereunto annexed." Among the conditions it was provided that "this insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by suicide or self-inflicted injuries.

Held, That death resulting from hanging one's self while insane was not chargeable to bodily infirmities or disease or suicide or self-inflicted injuries, and the policy was liable.

FRY & BABB & GEO. S. HOUSE, *for Defendant in Error.*

GRAY, J.

This was an action against an accident insurance company upon a policy beginning thus:—

"In consideration of the warranties made in the application for this insurance, and of the sum of fifty dollars, this company hereby insures Edward M. Crandal, by occupation, profession, or employment a president of the Crandal Manufacturing Company," in the sum of ten thousand dollars for twelve months, ending May 23, 1885, payable to his wife, the original plaintiff, "within thirty days after sufficient proof that the insured at any time within the continuance

* Decision rendered, March 7, 1887.

of this policy shall have sustained bodily injuries, effected through external, accidental, and violent means within the intent and meaning of this contract and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof; or, if the insured shall sustain bodily injuries by means as aforesaid, which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured, then, on satisfactory proof of such injuries, he shall be indemnified against loss of time caused thereby in the sum of fifty dollars per week for such period of continuous total disability as shall immediately follow the accident, and injuries as aforesaid, not exceeding, however, twenty-six consecutive weeks from the time of the happening of such accident."

Then followed certain conditions, the material part of which was as follows: "Provided, always, that this insurance shall not extend to hernia, nor to any bodily injury of which there shall be no external and visible sign; nor to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by the taking of poison, or by any surgical operation or medical or mechanical treatment; and no claim shall be made under this policy when the death or injury may have been caused by dueling, fighting, wrestling, unnecessary lifting, or by over-exertion, or by suicide, or by freezing, or sunstroke, or self-inflicted injuries."

The application was signed by the assured, and began as follows:—

"The undersigned hereby applies for a policy of insurance against bodily injuries effected through external and accidental violence, said policy to be based upon the following statement of facts, which I hereby warrant to be true."

The rest of the application consisted of fifteen numbered paragraphs, stating the name, age, residence, and occupation of the applicant, the amount, term, and payee of the policy applied for; affirming that he had never been "subject to fits, disorders of the brain, or any bodily or mental infirmity," that he had not in "contemplation any special journey or any hazardous undertaking," and that his habits of life are correct and temperate;" and expressing his understanding of the effect of the insurance in several particulars, the last of which was as follows:—

"15. I am aware that this insurance will not extend to hernia, nor to any bodily injury of which there shall be no external and visible

sign, nor to any bodily injury happening directly or indirectly in consequence of disease, nor to death or disability caused wholly or in part by bodily infirmities or by disease, or by the taking of poison, or by any surgical operation or medical or mechanical treatment, nor to any case except when the accidental injury shall be the proximate and sole cause of disability or death."

The assured died July 7, 1884; and the plaintiff soon afterward gave to the defendant written notice and proofs of the death, which stated that the assured, while temporarily insane, hanged himself with a pair of suspenders attached to a door-knob in his bed-room.

At the trial the plaintiff introduced evidence that the death of the assured was caused by strangulation from him so hanging himself; and, against the defendant's objection and exception, was permitted to introduce evidence tending to show that he was insane at the time. At the close of the plaintiff's evidence, the defendant moved the court to instruct the jury that under the law and the evidence in the case, the plaintiff was not entitled to recover. The court overruled the motion, and the defendant excepted. The defendant then introduced evidence, and the case was argued to the jury.

The jury, under instructions to which no exception was taken, and in answer to specific questions from the court, returned a special verdict that Edward M. Crandal made the application; that the defendant issued the policy; that the premiums were fully paid, and the policy was in force at the time of his death; that he hanged himself on July 7, 1884, and thereof died on the same day; that he was insane at the time of his act of self-destruction; and that due notice and proof of death were given to the defendant; and, according to what, upon these facts, the opinion of the court in matter of law might be, found for the plaintiff in the full amount of the policy, or for the defendant.

The court overruled a motion for a new trial, and rendered judgment on the verdict for the plaintiff. The defendant sued out this writ of error.

The refusal of the court to instruct the jury, at the close of the plaintiff's evidence, that she was not entitled to recover, cannot be assigned for error, because the defendant at the time of requesting such an instruction had not rested its case, but afterward went on and introduced evidence in its own behalf: *Grand Trunk Railway vs. Cummings*, 106 U. S., 700; *Bradley vs. Poole*, 98 Mass., 169. The subsequent instructions to the jury were not excepted to. No error is assigned in the previous rulings upon evidence, except in the ad-

mission, against the defendant's objection and exception, of evidence tending to prove the insanity of the assured. The only other matter open upon this record is whether the judgment for the plaintiff is supported by the special verdict, which finds that, while the policy was in force, the assured died by hanging himself, being at the time insane, and that due notice and proof of death were afterward given.

The single question to be decided, therefore, is, whether a policy of insurance against "bodily injuries, effected through external, accidental, and violent means," and occasioning death or complete disability to do business, and providing that "this insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by suicide, or self-inflicted injuries," covers a death by hanging one's self while insane.

The decisions upon the effect of a policy of life insurance, which provides that it shall be void if the assured "shall die by suicide," or "shall die by his own hand," go far toward determining this question. This court, on full consideration of the conflicting authorities upon that subject, has repeatedly and uniformly held that such a provision, not containing the words "sane or insane," does not include a self-killing by an insane person, whether his unsoundness of mind is such as to prevent him from understanding the physical nature and consequences of this act, or only such as to prevent him, while foreseeing and premeditating its physical consequences, from understanding its moral nature and aspect: *Life Ins. Co. vs. Terry*, 15 Wall, 580; *Bigelow vs. Berkshire Ins. Co.*, 93 U. S., 284; *Insurance Co. vs. Rodel*, 95 U. S., 232; *Manhattan Ins. Co. vs. Broughton*, 109 U. S., 121. In the last case, which was one in which the assured hanged himself while insane, the court, repeating the words used by Mr. Justice Nelson, when chief-justice of New York, said that "self-destruction by a fellow-being bereft of reason can with no more propriety be ascribed to the act of his own hand than to the deadly instrument that may have been used by him for the purpose," and "was no more his act, in the sense of the law, than if he had been impelled by irresistible physical force." 109 U. S., 132; *Breasted vs. Farmers' Loan & Trust Co.*, 4 Hill, 73. In a like case, Vice Chancellor Wood (since Lord Chancellor Hatherly) observed, that the deceased was "subject to that which is really just as much an accident as if he had fallen from the top of a house." *Horn vs. Anglo-Australian Ins. Co.*, 30 Law Journal (N. S.), Ch. 511; s. c., 7 Jurist (N. S.), 673. And in another case, Chief Justice Appleton said, that "the insane suicide no more dies by his own hand than the suicide

by mistake or accident," and that, under such a policy, "death by the hands of the insured, whether by accident, mistake, or in a fit of insanity, is to be governed by one and the same rule:" *Esterbrook vs. Union Ins. Co.*, 54 Maine, 224, 227, 229.

Many of the cases cited for the plaintiff in error are inconsistent with the settled law of this court, as shown by the decisions above mentioned.

In this state of the law, there can be no doubt that the assured did not die "by suicide," within the meaning of this policy; and the same reasons are conclusive against holding that he died by "self-inflicted injuries." If "self-killing," "suicide," "dying by his own hand," cannot be predicated of an insane person, no more can "self-inflicted injuries," for in either case it is not his act.

Nor does the case come within the clause which provides that the insurance shall not extend to "death or disability which may have been caused wholly or in part by bodily infirmities or disease."

If insanity could be considered as coming within this clause, it would be doubtful, to say the least, whether, under the rule of the law of insurance which attributes an injury or loss to its proximate cause only, and in view of the decisions in similar cases, the insanity of the assured, or anything but the act of hanging himself, could be held to be the cause of his death: *Scheffer vs. Railroad Co.*, 105 U. S., 249, 252; *Trew vs. Railway Passengers' Assurance Co.*, 5 H. & N., 211, and 6 H. & N., 839 and 845; *Reynolds vs. Accidental Ins. Co.*, 22 Law Times (N. S.), 820; *Winspear vs. Accident Ins. Co.*, 42 Law Times (N. S.), 900; affirmed, 6 Q. B. D., 42; *Lawrence vs. Accidental Ins. Co.*, 7 Q. B. D., 216, 221; *Scheiderer vs. Travelers Ins. Co.*, 58 Wisconsin, 13.

But the words "bodily infirmities or disease" do not include insanity. Although, as suggested by Mr. Justice Hunt in *Life Ins. Co. vs. Terry* (15 Wall., 589), insanity or unsoundness of mind often, if not always, is accompanied by, or results from, disease of the body, still, in the common speech of mankind, mental are distinguished from bodily diseases. In the phrase "bodily infirmities or disease," the word "bodily" grammatically applies to "disease," as well as to "infirmities;" and it cannot but be so applied without disregarding the fundamental rule of interpretation, that policies of insurance are to be construed most strongly against the insurers, who frame them. The prefix of "bodily" hardly affects the meaning of "infirmities" and it is difficult to conjecture any purpose in inserting it in this proviso, other than to exclude mental disease

from the enumeration of the causes of death or disability, to which the insurance does not extend.

In the argument for the plaintiff in error, some stress was laid on the fact that the concluding paragraph of the application differs in form of expression, so as to include mental as well as bodily diseases. It is by no means clear that this is so; but if it were, it would not affect the case. The whole application is not made part of the contract, and the only mention of it in the policy is in the opening words, "In consideration of the warranties made in the application for this insurance." This does not include all the statements in the application, but only those which are warranties. Some of them may be; others clearly are not. The statements as to the age, occupation, previous state of health and present habits of the assured, and as to his other insurance, may be warranties on his part. Those as to the amount, terms, and payee of the policy applied for, certainly are not. The statements expressing his understanding of what will be the effect of the insurance are statements not of fact, but of law, and cannot control the legal construction of the policy afterward issued and accepted.

The death of the assured not having been the effect of any cause specified in the proviso of the policy, and not coming within any warranty in the application, the question recurs, whether it is within the general words of the leading sentence of the policy by which he is declared to be insured "against bodily injuries effected through external, accidental, and violent means." This sentence does not, like the proviso, speak of what the injury is "caused by," but it looks only to the "means" by which it is effected. No one doubts that hanging is a violent means of death. As it effects the body from without it is external, just as suffocation by drowning was held to be in the cases of Trew, Reynolds, and Winspear, above cited. And, according to the decisions as to suicide under policies of life insurance, before referred to, it cannot, when done by an insane person, be held to be other than accidental.

The result is, that the judgment of the circuit court in favor of the plaintiff was correct and must be affirmed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BACHELLER

vs.

COMMERCIAL UNION ASS'N CO.*)

...nce that A built a schoolhouse under a written contract, and, after the making of the contract, bought the land upon which the house was built, having promised to do so if the town would vote to locate it there; that it was used by the town as a schoolhouse; and that A participated in town meetings at which it was voted to raise money for the purpose of insuring — is sufficient to warrant the submission to the jury of the question whether, as between A and the town, it belonged to the latter as personal property.

...contract on an insurance policy upon a schoolhouse. The defense relied on was that the insured had no insurable interest. The plaintiff, Betsey A. Batcheller, was the wife of Horace Batcheller, of Sutton. Prior to September, 1875, a schoolhouse in school district No. 1, in Sutton, was burned, and the school for that district had thereafter kept in the house of plaintiff's husband. Measures were taken to rebuild or build a new schoolhouse in said district, and several meetings were held, at which sundry votes were passed regarding the building of the new schoolhouse, until, February 26, 1876, it was voted that the building committee report "the lowest bidder on a schoolhouse." The committee reported Horace Batcheller as the lowest bidder, and he stated in said meeting that the bid made was \$748. A contract, the material parts of which appear in the opinion, was thereupon drawn up, which was executed by the committee of the district and said Horace Batcheller, under seal, and February 28, 1876. At the meeting of February 26th it was voted on motion of Horace Batcheller, "to get the schoolhouse in-

Decision rendered, February 23, 1887.—From *Northwestern Reporter*.

sured as soon as completed." After several meetings it was finally voted, on March 16, 1876, in accordance with the express desire of Mr. Batcheller, "to change the location of the schoolhouse lot," and "to locate the lot on P. Johnson's land, west of Widow Kelley's;" the last location being the one advocated by Batcheller, and the one agreed upon by him and the committee of the district, and the one upon which the schoolhouse was actually built. It also appeared that Batcheller was, on or before May 16, 1876, paid by the district the whole contract price for building the schoolhouse, which had been finished in 1876, and which was continually occupied by the district from that time until the existence of the district was terminated by the general act of the legislature abolishing school districts in 1882, after which the town of Sutton occupied the building uninterruptedly for the regular terms of school, including the term ending in the latter part of February, 1884. Evidence tended to show that in 1877 Batcheller gave a receipt for the contract price, dated May 16, 1876. On the fifth of March, 1881, as the record put in the case showed, at a legal meeting and under an appropriate article in the warrant, the district voted to raise \$25 for insurance and repairs, and the evidence tended to show that this insurance applied to the schoolhouse in question; that Batcheller was present at the meeting, engaged in the discussion as to what company the district had better insure in, and subsequently had a conversation with one Morse in regard to calling a new meeting to change the insurance company. The evidence further tended to show that at the time Batcheller was advocating a change of location of the schoolhouse to the spot where it was finally built, which was near his house, he was not the owner of the land upon which the house was built, but that it was owned by Pliny F. Johnson; that Batcheller made a proposition in a meeting assembled, and also to the committee who had been empowered by the district to build the schoolhouse, that if they would change the location, and locate the schoolhouse upon Johnson's land, where it was in fact built, he would build the same for \$748, and would give the district the land. After the vote to locate, and the entering upon a contract with the town, to wit, on April 26, 1876, Batcheller purchased the land upon which the schoolhouse was located from said Johnson, and took a deed thereof to himself. There was also evidence that Batcheller caused a deed of the lot to be prepared, by which he conveyed the land to school district No. 7, contemporaneously with or shortly after the conveyance by Johnson to him. This deed was never delivered, but

there was testimony that Batcheller then 'and afterwards said that he should deliver the deed if the school district continued, but that if the school district were abolished, and the town became charged with the maintenance of schools, he should not deliver the deed. The schoolhouse was constructed, as buildings ordinarily are, on a firm and permanent foundation set in earth, and not on posts or wooden blocks. There was also evidence that Batcheller offered the school building for sale at public auction, March 22, 1884. On March 4, 1884, he effected the insurance in question with the defendant company by a policy conforming to the Massachusetts standard policy of insurance, \$800 on his new, frame, schoolhouse building and furniture. Evidence further tended to show that Batcheller moved the school furniture from the building to his own barn, at his own house; that the inhabitants of Sutton thereupon brought a bill in equity in the supreme judicial court seeking to restrain Batcheller from any further interference with the schoolhouse; that at the hearing for a preliminary injunction held on April 4, 1884, an injunction pendente lite was granted against Batcheller restraining him from interfering with the building, and a mandatory injunction requiring him to restore at once the furniture to the building until further order of the court. On the morning of April 5, 1884, the schoolhouse was burned, and the inhabitants of Sutton, unwilling to even rebuild upon that site, and not caring to prosecute any claims to the land after the building was burned off of it, consented to a decree "bill dismissed" to dispose of the case. It was offered to be shown by the defendant that the town insured the schoolhouse building at that time, in the Fitchburg Mutual Insurance Company, and had since been paid by the insurance company the insurance on the building; but this evidence was excluded by the court.

At the trial in the superior court, before Hammond, J., the defendant claimed, that upon the facts there was a question for the jury whether or not there was any such agreement between Batcheller and school-district No. 7 as made the schoolhouse the personal property of the district, while Batcheller held the title to the land, or until the time of the fire. The court being of opinion that, upon the facts offered in evidence, the jury would not be justified in finding that the schoolhouse was personal property as between Batcheller and the town, ruled that there was an insurable interest in the plaintiff, she being the legal owner of both the land and the schoolhouse at the time of the time of the assignment of the policy to her,

and at the time of the fire; and, it being admitted that the value of the property insured was not less than the amount of the insurance, directed a verdict for the plaintiff for the amount insured, and interest, which verdict was taken. To this ruling the defendant excepted, and the presiding judge reported the case for the determination of the supreme judicial court.

W. S. B. HOPKINS, *for Defendant.*

It may be generally stated that in order to give a building annexed to the soil permanently the character of the personalty, there must exist some understanding or agreement between the owner of the soil and the owner of the building, but that such agreement need not be expressed, but may be implied from the circumstances, is a well-established principle of law: *Murphy vs. Marland*, 8 Cush., 575-578; *First Parish vs. Jones*, id., 184, 190; *Oakman vs. Dorchester Mut. Fire Ins. Co.*, 98 Mass., 57. It is to be observed that Batcheller had not sold this land to the district, and given them a bond to convey. He did not own it himself when he induced the district to locate its schoolhouse there, and promised that if they would do so he would give them the land, and would build the schoolhouse at a fixed and moderate price. See *Wood vs. Hewett*, 8 Q. B., 913, 917, 918; *Lancaster vs. Eve*, 5 C. B. (N. S.), 717; *Goff vs. O'Conner*, 16 Ill., 421. In *Cooper vs. Adams* (6 Cush., 87) the court say that there was no evidence to prove that the houses were even intended to be held as personal property. See, also, *Russell vs. Richards*, 10 Me., 429; *Wells vs. Banister*, 4 Mass., 514; *Howard vs. Fessenden*, 14 Allen, 124; *Dame vs. Dame*, 38 N. H., 429; *Pope vs. Skinkle*, 45 N. J. Law, 39; *Little vs. Willford*, 31 Minn., 173, 17 N. W. Rep., 282; *Central Branch R. Co. vs. Fritz*, 20 Kan., 430. That this agreement, that a building shall be personalty, may be shown by inference from a subsequent recognition of rights which can only result from the existence of such an agreement, is recognized: *Morris vs. French*, 106 Mass., 326. Batcheller has been paid for this building; has given his receipt in full. He knew it was insured for the town. He attempted to swindle this insurance company by insuring for himself. Shall he be paid twice for it? Indeed, the defendant offered to show that the building was insured at the time of the fire for the town, in pursuance of the same policy of insuring it for the public corporation inaugurated by Mr. Batcheller at the time of its erection, and indorsed by him subsequently in the Fitchburg Company, and that the loss had been paid for to the town. This evi-

dence, it seems to us, should have been admitted, and the exception to its rejection is well taken. If admitted, it would raise the question, shall this building be paid for three times, instead of two? If the building was personalty between the owner of the soil and the public corporation, Mr. Batcheller had no insurance interest in it. If it was realty, the town had no insurable interest in it. The conduct of the parties during a series of years, addressed to this issue, shows clearly that they deemed it the property of the town and insurable by the town.

T. G. KENT and G. T. DEWEY, *for Plaintiff.*

The plaintiff's grantor had an insurable interest in the property at the time of the taking out of the policy. He was the legal owner of the land, and the house was erected on permanent foundations set in earth, and not on posts or wooden blocks. There is nothing in the facts sufficient to warrant the jury to find that the building was personal property: *Poor vs. Oakman*, 104 Mass., 309; *Oakman vs. Dorchester Mut. Fire Ins. Co.*, 98 Mass., 57; *Milton vs. Colby*, 5 Metc., 78; *Hutchins vs. Shaw*, 6 Cush., 58. The slightest interest in the property is sufficient to become insurable, and the assurance company have nothing to do with any equitable interest between the town or district and Horace Batcheller or the plaintiff: *Williams vs. Roger Williams Ins. Co.*, 107 Mass., 377; *Walsh vs. Philadelphia Fire Ass'n*, 127 Mass., 383, and cases cited; *Curry vs. Commonwealth Ins. Co.*, 10 Pick., 535; *Strong vs. Manufacturers' Ins. Co.*, 10 Pick., 40; *May, Ins.*, §§ 283, 285.

HOLMES, J.

A majority of the court are of opinion that there was evidence for the jury that the schoolhouse insured by the defendant was personal property as between the town of Sutton and the plaintiff Batcheller, and belonged to the town. No one doubts that, if an agreement to that effect was proved, it would be effectual: *Morris vs. French*, 106 Mass., 326; *Howard vs. Fessenden*, 14 Allen, 124; *Ham vs. Kendall*, 111 Mass., 297; *Doty vs. Gorham*, 5 Pick., 487; *Carpenter vs. Walker*, 140 Mass., 416, 5 N. E. Rep., 160.

It appears by the report that the schoolhouse was built by Batcheller, under a contract between him and the school-district. That contract was made when it was still uncertain when the house would be built, and before Batcheller's promise to give the land. It therefore must be construed without regard to the ownership of the land on which it was built, and the conclusions to be drawn from

the expressions used in it are not restricted by evidence that they were used with reference to expectations then entertained as to the ownership of the land. By that contract Batcheller agreed on February 28, 1876, with the district "for building for them a schoolhouse," and speaks of it as "their schoolhouse;" agrees to furnish material aid to make and finish "a schoolhouse for said district;" the compensation to be paid "on the completion and acceptance of the schoolhouse." This was executed by Batcheller and the district under seal. On March 16, 1876, it was voted on Batcheller's advocacy, to locate on this land. On April 26 of the same year, Batcheller bought the land, it would seem, while the schoolhouse was in process of building. The schoolhouse seems to have been built in April and May. At all events, it was built in pursuance of the above contract. The foregoing facts, coupled with the using the building as a school by the town, and with Batcheller's conduct as to the insurance, March 5, 1881, and at other meetings, are some evidence, at least, that as between Batcheller and the town, the town owned the schoolhouse, and therefore, as it did not the land, that the house was personal property. If the parties contemplated the result that the town should be owner in any event, it is not necessary that they should have contemplated specifically the legal machinery by which the result must be worked out: *Bassett vs. Daniels*, 136 Mass., 547, 549. The case is not like those where a building is erected by a party having a bond for a deed of the land, as in *Poor vs. Oakman*, 104 Mass., 309. In such cases there is nothing, except the contemplation that the party building the house will acquire the land, to show that it is contemplated that he is to own the house. The ownership of the house is wholly incident to the acquisition of the land.

The question whether the plaintiff had an insurable interest by reason of possession or otherwise, even if the house was personal property, is not raised by the exceptions. New trial ordered.

COURT OF APPEALS OF KENTUCKY.

Appeal from Daviess Circuit Court.

JOHNSON & CO., ETC.,

vs.

CONNECTICUT FIRE INS. CO., ETC.

LANCASHIRE FIRE INS. CO., ETC.,

vs.

JOHNSON & CO., ETC.*

The insured had been in the habit of insuring in several companies for short periods, and renewing from time to time as occasion required on tobacco in a stemmiery, which was shipped as fast as prepared. Some of the policies having expired, the agent was informed according to the insured that insurance to the amount of \$12,000 on the stock was wanted, and that if the insurance remaining did not equal that sum, it was to be made up by renewals or new policies; that the insured did not know how much insurance remained, and that the agent upon examining his books reported a certain amount in force, and subsequently brought additional policies for the balance, and that it was agreed that the agent should select the companies, but that it proved that part of the insurance reported in force had expired.

Held, That there was no contract with the agent for a renewal of the policies erroneously supposed to be in force, and the companies were not liable.

Held, That to establish such an executory contract, it must appear that the agreement was complete, and nothing left for future determination. The burden of proof is on the party claiming such a contract.

WEIR, WEIR & WALKER, for Insurance Companies.

G. W. JOLLY, for Johnson & Co., etc.

* Opinion filed, November 20, 1886.

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W. S. Johnson & Co. were engaged in buying and handling tobacco in their stemmery in the city of Owensboro, Ky. On the 26th day of August, 1880, this stemmery, together with a large quantity of tobacco, was destroyed by fire. They brought suit in the Daviess Circuit Court against the Lancashire, Phoenix, Springfield, Franklin, Lorillard, Liverpool and London and Globe, and Imperial and Northern Insurance Companies, and the Insurance Company of North America, claiming that they, at the time of said fire, held actual insurance, and a parol contract for insurance, in said companies, for sixteen thousand four hundred dollars on said tobacco. That said insurance was for the benefit of Sherley & Glover, who had advanced them the money with which they purchased said tobacco, except the insurance in the Franklin Insurance Company for one thousand dollars, which was for the benefit of farmers who had tobacco in said stemmery, and the insurance in the Insurance Company of North America, which was for the benefit of the Deposit Bank of Owensboro.

The Franklin Insurance Company and the Insurance Company of North America ended the litigation, as far as they were concerned, by paying the sums claimed against them.

The lower court rendered judgment dismissing the petition of W. S. Johnson & Co. as against the Connecticut, the Lorillard, the Liverpool and London and Globe, and the Imperial and Northern Insurance Companies.

W. S. Johnson & Co. have appealed from said judgment.

The lower court rendered judgment against the Lancashire, the Phoenix, and the Springfield Insurance Companies for two thousand dollars each, with interest from December the 1st, 1880. From said judgment they have appealed.

The appeal of W. S. Johnson & Co. against the Connecticut Insurance Co., etc., will be disposed of first.

The appellants, W. S. Johnson & Co., prior to the 24th of August, 1880, had been in the habit of insuring their tobacco in the Connecticut, the Lorillard, the Liverpool and London and Globe, the Imperial and Northern, the Springfield, the Lancashire, and the Phoenix Insurance Companies. The insurance in each was, usually, two thousand dollars. Owing to the fact that said tobacco was to be shipped to market as fast as it could be prepared, the insurance was taken out for short periods of time and renewed, from time to time, as occasion required. John Wandling was the local agent at Owensboro

for all these companies, and with him appellants contracted for said insurance.

Mr. Cottrell, one of the members of appellants' firm, swears that on the 24th of August, 1880, his attention was called to the fact by John Wandling, that the insurance on his tobacco was running low by reason of some of the policies having expired, and suggested that they be renewed. That he then informed Wandling that he desired as much as twelve thousand dollars insurance on his tobacco, and if the insurance remaining on it did not amount to that much, he desired the difference made up by renewals or new policies. That he did not know how much insurance there then was on the tobacco, or how much had expired, which he informed Wandling; and told him that whatever amount the actual insurance on the tobacco fell short of twelve thousand dollars, he desired renewals, or new policies, issued sufficient to make the whole amount of insurance as much as twelve thousand dollars.

That Wandling, also professing not to know how much insurance there then was on the tobacco, looked at his book to ascertain the amount, and reported the policies on the tobacco in the Imperial and Northern, the Connecticut, the Lorillard, and the Liverpool and London and Globe Insurance Companies, for two thousand dollars each, as alive and in force. That he, Cottrell, knowing nothing to the contrary, and relying on said statement as true, agreed with Wandling that he should give him additional insurance for four thousand dollars on the tobacco, both believing, from the investigation made by Wandling, that said sum would make twelve thousand dollars in all, insurance on the tobacco. That Wandling did, within a day or two thereafter, deliver to appellants policies in the Lancashire and Phoenix Insurance Companies for two thousand dollars each.

Cottrell also swears that it was the agreement between appellants and Wandling that Wandling was to select for them the companies in which he would insure them.

On the other hand, John Wandling swears that on the 24th of August, 1880, Cottrell came to his office and wished to know how much insurance he had on his tobacco; that he took him to his book and read over to him the name of each company in which he had insurance and the amount of each policy as it appeared on the book, giving the expiration of each. That Cottrell was looking with him in the book. That it appeared from said reading that the policies in the four insurance companies above named, for two thousand dollars each, were alive and in force; that the policy in the Lanca-

shire for two thousand dollars had expired on the 21st of August, 1880; and that the policy in the Phoenix expired that day, the 24th of August, 1880. That Cottrell then said, renew the policies in the Lancashire and Phoenix for two thousand dollars each, which he, Wandling, agreed to do, and they were issued that day and delivered the next day. Wandling also says that there was nothing said about twelve thousand dollars insurance, or enough insurance to make twelve thousand dollars.

J. C. Wandling swears that he was present while said book was being examined. As to what occurred during that time, and immediately after, he corroborates John Wandling.

It turned out, on investigation a day or two after the fire, that it was a mistake about the policies in said four companies being alive and in force on the 24th of August; that all of them had expired before then, which left the policy for two thousand dollars in the Springfield Insurance Company, which was alive and in force on the 24th of August, 1880, and the two renewed policies in the Lancashire and the Phoenix for two thousand dollars each, as all of the insurance evidenced by written policies that appellants had on said tobacco at the time of the fire.

The appellants' contention amounts to this: That, as they and Wandling believed that the policies in the said four companies for two thousand dollars each were alive and in force, and as it was understood by Wandling that they desired as much as twelve thousand dollars insurance on said tobacco, to which he was agreed, which sum they, as well as Wandling, believed, by taking the additional policies in the Lancashire and Phoenix for two thousand dollars each, they would obtain; and as Wandling made the mistake about there being policies alive and in force in said four companies for two thousand dollars each, whereby they only obtained, together with the policy already in force in the Springfield Insurance Company for two thousand dollars, policies for six thousand dollars on said tobacco, the said companies, appellees, are liable to them as on a verbal contract of insurance for the remaining six thousand dollars, or are estopped to deny their liability for that sum.

Presuming that Cottrell and John and J. C. Wandling were equally veracious in testifying as to their recollection of the transaction of the 24th of August, 1880, we are, nevertheless, constrained to believe (judging by the rules of weighing evidence), that the transaction was substantially as the two latter recalled it. Be that, however, as

it may, the evidence of Cottrell himself fails to establish a cause of action against the appellees.

It is certain that the parties, on the 24th of August, 1880, made no contract of insurance—that is, an executed contract, evidenced by written policies in said companies—for twelve thousand dollars on said tobacco.

Also, we think that the parties made no contract to insure in said companies—that is, an executory contract—for twelve thousand dollars on said tobacco.

The latter kind of contract, usually existing in parol, must be established by the same class of proof required to establish any other contract. It must be shown that a complete contract was made. That an agreement to insure was, in fact, entered into, and that nothing essential to a complete agreement was left open for future determination. The burden is on the party attempting to establish such a contract to establish it by a preponderance of evidence.

Here, on the 24th of August, there was no contract made to insure with appellees' companies. The contract was with the Lancashire and the Phoenix alone for two thousand dollars each in their companies. The appellants and the appellees, it is true, thought that appellants had a live and enforceable contract of insurance in appellees' companies for eight thousand dollars, which turned out to be a mistake. Appellants and appellees' agent were both responsible for the mistake, or the agent alone; the fact, nevertheless, exists that no contract was made to renew the policies in appellees' companies.

Upon what principle then can appellants hold appellees responsible? It is upon the principle that because appellants and appellees thought that appellants had a live contract of insurance in appellees' companies, about which they were mistaken, and for that reason, probably, did not make a contract, therefore the court should make a new contract for them? This we cannot do. Had a contract been actually made to insure appellants in appellees' companies for eight thousand dollars, which, by mistake, was not done in accordance with the agreement, then the court could correct the mistake and enforce the contract according to its terms. But the mistake consisted in not making a contract. We, therefore, have no power to make one at the instance of appellants over the objection of appellees.

As to the question of estoppel the appellees, by their agent Wandling, made to the appellants no promise to renew said policies, nor

induced them to believe that they would renew the risk in their companies. Nor was appellees' agent alone responsible for the mistake in supposing that appellants' policies were still alive in their company. Cottrell also examined the book with Wandling; besides, he had good opportunity to know from other sources when said policies would expire. The mistake was mutual, and as much the fault of Cottrell as Wandling. Therefore, the rule of estoppel does not apply.

As to the appeal by the Lancashire Insurance Company, etc., against W. S. Johnson & Co., the evidence as to the quantity and value of the tobacco consumed by the fire, while somewhat unsatisfactory in some particulars, clearly preponderates in favor of the fact that said tobacco was worth largely more than the aggregate amount adjudged against the appellants by the lower court.

It appears from the record before us that the appellant, the Springfield Insurance Company, filed a separate answer to appellees' petition, in which it was distinctly alleged that appellees, in their sworn preliminary statement of loss by the fire, made willfully untrue and fraudulent statements of the quantity and value of the tobacco destroyed by the fire, etc., which, by the terms of the policy, rendered it void. Appellants failed to reply to this answer. Under the Civil Code the answer must, therefore, be treated as true. The case, therefore, as to the appellee, the Springfield Insurance Company, must be reversed. But as the proof was taken and heard as to the quantity and value of the said tobacco, which tended to show that if appellants made any misstatements of fact in their preliminary oath and proof of loss, they were innocently made, the lower court, therefore, will, upon the return of the cause, allow the appellants a reasonable time in which to file a reply to said answer, if they desire to do so, and then hear the case as to said appellee upon its merits. If they do not file said reply within a reasonable time, then the action as to said appellee must be dismissed.

The judgment of the lower court dismissing the petition of appellants, W. S. Johnson & Co., against the appellees, the Connecticut Insurance Co., etc., is affirmed. The judgment against the appellants, the Lancashire and Phoenix Insurance Companies, is affirmed. The judgment against the Springfield Insurance Company is reversed, and the cause remanded as to it for further proceedings consistent with this opinion.

UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

FIRE ASSOCIATION OF PHILADELPHIA

vs.

J. H. LAW AND ANOTHER.*

The company's general agents out of commissions, paid the expenses of the agency business, including compensation of subordinate agents, who were commissioned by the company, but the suggestion that they should be commissioned, and their names came from the general agents. The subordinate agents acted also for two other companies, reporting to the general agents in like manner as in respect of the business done for plaintiff company. The general agents were dismissed from the employ of the company, and the latter solicited the subordinate agents to continue in its employ. In an action against the company for injury to the business of the general agents by thus inducing the local agents to continue in the employ of the company,

Held, That if there were any property right in the good will of the sub-agents, it had been transferred to the company, but no such property right existed as rendered the company liable for their subsequent employment.

Held, That the sub-agents were the agents of the company under the law of the State which required their appointment as its representatives by a commission direct from the company.

Held, That the revocation of the general agency did not revoke the sub-agencies.

The plaintiff, a corporation of the State of Pennsylvania, had for several years employed as its general agents for Ohio, part of Kentucky and Indiana, the firm of Law & Co., of Cincinnati. The contract of employment fixed no term, and upon April 1, 1885, by notice served three months previously, the plaintiff dismissed defendants from its employ. Thereafter the plaintiff brought an action to

* Decision rendered, February, 1887.

recover \$8,447, premiums collected by defendants in the course of their agency, but not paid over or accounted for to the plaintiff.

The defendants by their answer admitted the receipt of the sums claimed, and that they were indebted to the plaintiff therein. They, however, alleged that they were engaged in business as general insurance agents, and as such conducted the business in the designated territory for the Royal and the London & Lancashire Insurance Companies, and for that purpose employed numerous subordinate or local agents. And they alleged that the plaintiff's misconduct had damaged them in the sum of \$30,000, for which they set up a counter-claim and asked judgment accordingly. The misconduct of plaintiff was alleged to consist in the employment by plaintiff after the discharge of defendants, of a number of the subordinate or local agents in the cities and towns of Ohio, Indiana, and Kentucky, who had been, or still were, as was alleged, the sole agents of the defendants. It was also alleged that the plaintiff had by letters, circulars, and personal appeal solicited the said sub-agents to cease doing business for defendants, and to undertake business for it. And it was alleged that plaintiff had invaded the good-will of defendants in their business as general insurance agents.

Upon a motion to strike out the counter-claim, Mr. Justice Matthews held that its allegations were so framed as to charge plaintiff with enticing away defendants' servants in respect of the business conducted by them for the Royal and London & Lancashire Companies, and with improper solicitation of the local agents in respect of that business. And this Mr. Justice Matthews held constituted a good cause of action or ground of counter-claim. At the trial before Hon. H. E. Jackson, the onus was upon the defendants to sustain their counter-claim. The evidence showed that defendants had been commissioned by the plaintiff and had been for a number of years in its employ as its general agents for Ohio, Indiana, and part of Kentucky; that for a commission of 25 per cent upon the premiums they paid the expenses of the business, including compensation to subordinate and local agents, except that the plaintiff furnished certain stationery. It was also shown that the subordinate local agents, improper solicitation of whom was alleged, were each separately commissioned by the plaintiff for the business, but that the suggestion of their names and that they should be so commissioned came invariably from defendants. It was shown, too, that these agents in like manner acted as subordi-

nate or local agents for the Royal and London & Lancashire Companies, reporting to Law & Co. in like manner as in respect of the business done for plaintiff. It was proven that the business of the Fire Association in the territory allotted to defendants had much increased during the term of defendants' employment, and that at the time of their discharge its value for reinsurance was between thirty and forty thousand dollars.

The invasion of defendants' property rights, as shown by their testimony consisted in the dismissal of defendants from their employment, and in requests by letter and circular, and by word of mouth to many of the local agents referred to to continue to act as agents for plaintiff, notwithstanding the dismissal of Law & Co. It was also in evidence that the laws of the States before named required the local agents to have commissions from the company they claimed to represent and to file them with the respective secretaries of State, as a condition precedent to entering upon business by or for such company within the said States respectively. Upon the conclusion of the testimony thus introduced by defendants, plaintiff moved the court to direct a verdict for plaintiff for the amount declared in its petition to be due, and against the defendants upon their counter-claim.

HOADLY, JOHNSON & COLSTON, for Plaintiff.

PAXTON & WARRINGTON, and KITTREDGE & WILBY, for Defendant's.

Charge by JACKSON, C. J.

Without attempting any definition of what constitutes the "good will" of a business, that shadowy right or property called, in some of the cases, "incorporeal personalty," and which no judge has ever succeeded in defining with accuracy, I simply state in connection with this case, that in the opinion of the court, this right of property, designated or described by the term "good will," has no existence in the relation of master and servant, employer and employee, or principal and agent; that it does not have and cannot have any application to that class of cases. But suppose it did? Then what is the transaction between the Fire Association of Philadelphia and Law & Co., whom that association selected as its general agents? Assuming that Law & Co. had what is called a "good will" in the connection between themselves and their local agents, and by express contract with the insurance company they agreed to employ those agents, or to have them appointed as sub-agents of the insurance company; that, based upon a valuable consideration, was a contract

on the part of Law & Co. to assign that good will for the benefit of plaintiff, the insurance company. It was not limited as to time, nor was it confined to the duration of their general agency.

For a consideration thus allowed them by the insurance company, they thus placed themselves in the attitude of vendors of the "good will" they had in their connection or association with the local agents, if any such good will existed. Under the arrangement between them, they conceded it to the Fire Association of Philadelphia, and said: "You may have and exercise this right which we will manage and supervise for you for a consideration of 25 per cent of all the premiums you receive in that business." No limitation or restriction was placed upon the right of the Fire Association to employ or retain the services of such local agents. There was no stipulation that this employment of the sub-agents should be limited to the period of the general agents' employment. The services of these local agents in whom the defendant now claims a property right called "good will," were transferred, so far as defendants could transfer them, to the plaintiff without qualification or reservation so far as the plaintiff's business was concerned. Under that aspect of the case, if the law relating to "good will" have any application to the suit, it seems to the court that Law & Co. were the parties who could not violate that arrangement.

While the question of bad faith does not necessarily arise in the present case, it appears to the court that both parties have been very diligent in trying to hold their business. There is no more bad faith on the part of the Fire Association of Philadelphia than existed on the part of Law & Co., when the latter sought, with their contract still in force, to have the policies of the Fire Association transferred to their other companies. They did this during the running of their agency. It seemed to be, on both sides, considered as a race of diligence for the employment of these agents and the business they represented. But without attaching any importance to that consideration, or to the point that if any good will or right of property belonged to defendants in the connection they had with the local agents, such right was, for a valuable consideration, transferred to plaintiff. The court is clearly of the opinion that the law of "good will" has no application to this case, that the defendants had no such property right in the employment and service of the sub-agents as would render plaintiff liable for employing them or retaining them in its service after the termination of its agency. On terms mutually acceptable, the company engages Law & Co. as their general agents;

these general agents are compelled, in order to transact and manage the business contemplated by the parties, to select for the Fire Association, sub-agents in each and all the localities designated as their territory. These sub-agents, in the opinion of the court, are the agents of the Fire Association of Philadelphia. They could not be otherwise under the laws of Ohio and Indiana, requiring their appointment as representatives of the company. It is true, as a matter of agreement, that their compensation is to come out of the general agent, or the allowance made to the general agent, and that the general agent guaranties the faithful performance of their duties, so far as payment of premiums is concerned.

But that is wholly immaterial. They are still agents of the Fire Association of Philadelphia, selected by defendants, but deriving their authority directly from the plaintiff, by whom they are appointed and commissioned. When Law & Company's agency was revoked, that revocation did not, in law, recall or revoke the agency of these substitutes or sub-agents in the different localities; they continued to be the agents of the Fire Association of Philadelphia, and there was no impropriety on the part of that association in soliciting them to continue that relation, nor did such solicitation involve any breach of defendant's rights, or subject the plaintiff to any legal liability towards the defendants.

Gentlemen of the jury, you will return a verdict for the plaintiff for the full amount claimed in the petition and against the defendants on their counter-claim.

Notice given of appeal to the U. S. Supreme Court.

SUPREME JUDICIAL COURT OF MASSACHUSETTS

WHORF

vs.

EQUITABLE MARINE INS. CO.*

A policy which provides that the company is not to be liable for any partial loss "on the vessel or freight, unless it amounts to 7 per cent exclusive of all charges," etc., covers the damages which the owners have been compelled to pay for injuries to another vessel from a collision occurring through the negligence of those in charge of the vessel insured, the policy having a clause annexed to the margin by which the company agreed to "cover the risk of loss by collision according to the decisions of the Supreme Court of Massachusetts prior to 1853, provided that the company shall not in any case be liable for a greater sum than the amount insured by this policy."

Action on a policy of insurance on a schooner. At the trial in the superior court, before Brigham, C. J., the following facts were agreed between the parties: That, November 26, 1884, the defendant made and delivered to plaintiff a policy of insurance, the material portions of which appear in the opinion; that, on April 14, 1885, the said policy still continuing in force, the schooner *Grace F. Littleton*, belonging to the plaintiff, and mentioned in said policy, collided with the brig *Pioneer*, which was lying at anchor; that the brig was damaged by said collision to the amount of \$525; that the *Grace F. Littleton* was alone in fault for said collision, and was liable to pay the damage suffered by said brig; that, in settlement of said damage she was compelled to pay and did pay the said sum of \$525 together with \$12.50 expenses and \$15 cost, which amounts were paid by her owner, the plaintiff, to the owners of said brig; that, i

* Decision rendered, February 26, 1887.—From *N. E. Reporter*.

der said policy the defendant is liable for the above loss by damage to said brig, it is agreed that judgment shall be entered in favor of the plaintiff for \$340, with interest thereon from November 17, 1885,—\$340 being the proportion of said loss falling upon the defendant, and under the policy in suit, by an adjustment of said loss duly made; otherwise judgment is to be for the defendant. Upon the above agreement, the court ordered judgment for plaintiff for the sum of \$340, and interest from November 17, 1885, and the defendant appealed.

FREDERICK DODGE, *for Defendant.*

The question is upon the construction to be given to certain provisions in a policy of insurance on a vessel. The value of the insured vessel is agreed in the policy. Deducting the premium according to *Stokes vs. Oriental Ins. Co.* (7 Pick., 259), we have an amount, 7 per cent of which is considerably in excess of the loss suffered by this vessel. The loss claimed is exempted by the policy. It would be impossible to deny that this is a partial loss: 2 Phil. Ins. (2d Ed.), § 1,424. Under the "7 per cent clause," taken by itself, therefore, the defendants are not liable. It is claimed that the effect of the "7 per cent clause," taken by itself, is controlled by other provisions of the policy, viz., the agreement to cover collision losses, and in the marginal clause above quoted. The policy, without the marginal clause in question, covers losses by collision, as well as those inflicted and paid for by the insured vessel as those suffered by the vessel. Both are, by the law of Massachusetts, losses caused by perils of the seas, and therefore one of the risks included in the provisions of the policy. This was established by the "decisions of the courts of Massachusetts prior to 1853:" *Nelson vs. Suffolk Ins. Co.*, 8 Cush., 477 (1851). The Supreme Court of the United States decided the same point the other way in 1852. *General Ins. Co. vs. Sherwood*, 14 How., 351. See, also, *Blanchard vs. Equitable Safety Ins. Co.*, 12 Allen, 386; *Thwing vs. Great Western Ins. Co.*, 111 Mass., 94, 108, 109. See *Nelson vs. Suffolk Ins. Co.*, 8 Cush., 490, 491. In view of the law as thus settled by this court, whether the marginal clause of the policy sued on, nor the written clause "covering collision," added anything to the printed enumeration of the risks assumed in the body of the policy. What the plaintiff claims is in violation of the well-settled rule of construction—that effect is to be given to all the stipulations of a contract, if possible, and that one is never to be sacrificed to another unless

the two are repugnant. See *Joyce vs. Realm Ins. Co.*, L. R. 7 Q. B., 580, 583. The plaintiff claims that the "seven per cent clause" applies only to partial losses "on the vessel" herself, and that the loss suffered was on another vessel, and not on the insured vessel. If this was not a loss on the insured vessel herself, it is not a loss within a policy on the vessel, notwithstanding the collision clause. See *Nelson vs. Suffolk Ins. Co.*, cited above; *Paddock vs. Commercial Ins. Co.*, 104 Mass., 532; 2 Arn. Ins., 800; *Padelford vs. Boardman*, 4 Mass., 548, 550. But as the language of the policy is not in the least ambiguous, and is capable of a plain and simple construction, just as it stands, which will give effect to all its stipulations, the court will not be justified in going outside of it to find out what it means. To hold the loss claimed within the policy is to reject the "seven per cent clause," and make it of no effect. There is no warrant of law for so doing, and judgment should be for the defendant.

H. P. HARRIMAN, *for Plaintiff.*

This is an action to recover the amount paid by the plaintiff for damages by collision to another vessel than the insured, and the policy contains a special provision as follows: "This company agrees to cover the risk of loss by collision, according to the decision of the courts of Massachusetts prior to 1853, provided that the company shall not in any case be liable for a greater sum than the amount insured by this policy." By the decisions of the courts of Massachusetts, prior to 1853, underwriters were held bound to pay the assured the amount paid by him to the owners of another vessel for damages suffered in collision with the vessel insured: *Nelson vs. Suffolk Ins. Co.*, 8 Cush., 477; *Thwing vs. Great Western Ins. Co.*, 111 Mass., 107. The collision clause in the policy in this action expressly states "that the company shall not in any case be liable for a greater sum than the amount insured by this policy," but contains no provision that the case shall reach any fixed amount before the company shall be liable, and, in accordance with the maxim, "*expressio unius, est exclusio alterius*," no such limitation should be allowed: *Pearson vs. Lord*, 6 Mass., 84. The clause in the body of the policy, which the defendant claims to apply in this case, manifestly applies to a loss by injury to the vessel insured. If the policy is of doubtful construction, it must be construed against the party making it: *Barney vs. Newcomb*, 9 Cush., 56, and cases cited. That the rule of construction, "*contra proferentem*," should.

apply in the construction of written or printed instruments, is founded in the reason "that it is the fault of the maker that he did not use words to express the purpose and intention he now claims more plainly:" 1 Pars. Ins., 69, note 1, and cases cited.

DEVENS, J.

By a proviso in the policy issued by the defendant corporation, it was not to be held liable for any partial loss "on the vessel or freight, unless it amounts to seven per cent exclusive of all charges," etc. If this applies to a loss of such a description as that for which compensation is sought in this action, it operates to exempt the defendant from liability, as it did not amount to a sum equal to 7 per cent of the value of the vessel as agreed in the policy. The insured vessel collided with another, was herself alone in fault, and the loss to her occurred by reason of the damages which her owners were necessarily compelled to pay to the owners of the other vessel. By a clause annexed to the margin of the printed form of policy, the company agreed to "cover the risk of loss by collision according to the decisions of the Supreme Court of Massachusetts prior to 1853, provided that the company shall not in any case be liable for a greater sum than the amount insured by this policy."

The case of *Nelson vs. Suffolk Ins. Co.* (8 Cush., 477) was decided in 1851, and it was there held that underwriters insuring a vessel against perils of the sea are bound to pay the assured the amount paid by him to the owners of another vessel for damages suffered in a collision with the vessel insured, occasioned by the negligence of the master and crew of the latter. As this contract was made in Massachusetts, and as the decision referred to has been re-affirmed after full consideration, the policy, without the aid of the marginal clause in question, would have covered a loss by collision, even if inflicted by the insured vessel, if under such circumstances that she was compelled to pay for it as well as one suffered by her: *Blanchard vs. Equitable Safety Ins. Co.*, 12 Allen, 386; *Thwing vs. Great Western Ins. Co.*, 111 Mass., 94-108. It may be presumed that, in view of the fact that the United States court has decided the point involved, in *Nelson vs. Suffolk Ins. Co.*, otherwise, the parties saw fit to make their contract on this point express.

It is the contention of plaintiff that, as the marginal or collision clause in the policy expressly states "that the company shall not in any case be liable for a greater sum than the amount insured by this policy," but contains no provision that the loss shall reach any fixed

amount before the company shall be liable, it must be inferred that it was intended to withdraw a loss by collision, at any rate when the party insured was in fault, from the effect of the provision which is found in the policy that a loss on the vessel must amount to 7 per cent before the insurers shall be liable. Where it is thus provided, it would be a very violent inference to hold that losses by collision should be exempt therefrom, because, in the clause relating to collision losses, it is said that the company will not be responsible for these beyond the amount insured by the policy. Even if the marginal clause, because pasted on the policy, is entitled to greater weight than the general printed form, as it has sometimes been held that words written into a policy might indicate that the attention of parties to a contract had been more particularly drawn to them, this principle is not of importance, except when there is some variance between that which is written and that which is printed. There is certainly no inconsistency here between the provision as to losses by collision and that which makes the company responsible only when the loss amounts to 7 per cent. As it applies to partial losses on certain goods and freight, as well as on the vessel itself, it was without doubt inserted that the insurers might be relieved from the necessity of investigating claims for losses comparatively trifling in amount. It is further suggested by the plaintiff that this proviso manifestly applies to a loss by injury directly inflicted on or occurring to the vessel insured, as no other vessel is mentioned in the body of the policy. This argument disregards the ground upon which the case of *Nelson vs. Suffolk Ins. Co.*, *supra*, was decided, and upon which the plaintiff would have been entitled to recover if the loss he had been compelled to pay had amounted to 7 per cent of the value of his vessel. It is because the damage done to another vessel, which the insured vessel is compelled to pay, is a loss to the owner, insured against perils of the seas, and is, in its results, the same to the insured as if the damage had been done to his own ship, that it becomes a loss within the policy. If the argument of the plaintiff were sound, it would be held that there could be no recovery by the insured for the damage done to another vessel.

Judgment for defendant.

UNITED STATES CIRCUIT COURT.

WESTERN DISTRICT OF MICHIGAN.

CONNOR, FOR USE, ETC.,

vs

HANOVER INS. CO.

The policy was issued to a resident of Michigan on property there by a New York company doing business in Michigan and Illinois. Prior to the adjustment of the loss the company was garnished by a creditor of the insured in Illinois in an Illinois court. After the adjustment the claim was assigned by the insured to another party who brought suit in the court of Michigan for recovery, and obtained judgment. The Illinois case was afterwards tried and judgment obtained there by the garnishee.

Held, That suit having first been commenced in Illinois and control of the subject-matter having been obtained by garnishment, the courts of Michigan had no jurisdiction.

Motion to vacate an order granting stay of execution on judgment.

N. A. FLETCHER, *for Plaintiff*.

MARK NORRIS, *for Defendant*.

SEVERENS, J.

The plaintiff procured a fire insurance of the defendant upon a building situate at Charlevoix, in this State. She then was and still is a resident of Michigan. The defendant is a corporation organized under the laws of the State of New York, and has its principal place of business at the city of New York, and performs its vital functions there. But it also transacted insurance business in Michigan, Illinois, and other States of the Union, under local statutes permitting it, their terms and regulations vary somewhat; a quite general

condition being, however, that it should submit to the jurisdiction of the local courts, and make provision for the service of process upon it in the particular State. A loss, covered by the policy, having occurred, it was adjusted without waiver of defenses on the part of the company, and soon thereafter the claim against the company was assigned by the plaintiff to the parties for whose use the present suit is brought. But prior to the loss the plaintiff had become indebted to certain citizens of Illinois, residing at Chicago, who immediately on the occurrence of this fire, and before the loss was adjusted, commenced suit by attachment against the present plaintiff, and garnished the defendant in the State court, under statutes of Illinois permitting such proceedings. Due service of the process of garnishment was had, but there was no service of the principal writ against the defendant therein. The company appeared, and disputed its liability upon legal grounds. Before those cases came on for trial this suit was instituted in this court. The defendant set up the pendency of the Illinois suits, and, on the trial before the late circuit judge, Baxter, the facts appearing either by record or the stipulation of the attorneys in the case, the judge directed a verdict for the plaintiff, and judgment accordingly, and thereupon ordered a stay of execution until the further order of the court. Motion is now made to vacate the stay.

Since the trial here one of the cases in Illinois has been moved forward to trial, and, notwithstanding the contest of liability to the plaintiff's claim in that jurisdiction, judgment has been rendered against it. The other case in that State has not yet been brought to trial, but the law and facts are understood to be the same as in the case which has gone to judgment. Thus, the whole question of right between the contending parties comes up on this motion, and, upon the practice which has been adopted, it is free from any question of pleading.

It is contended by counsel for the plaintiff that the debt due from the defendant is not within the control of legislation by the State of Illinois, or the jurisdiction of her courts; and the reason given is that, whether the situs of the debt be in Michigan, where the creditor resides, or in New York, where the debt is legally payable, it certainly is not in Illinois; and that it is not subject to any proceeding there, that it is wholly extraterritorial to that authority and jurisdiction, and that the attempt to draw it within their control is an unauthorized and arbitrary assumption. And, as tending to support this view, the following cases are cited: *Tingley vs. Bateman*, 10

Mass., 343; Ray vs. Underwood, 3 Pick., 302; Hart vs. Anthony, 15 Pick., 445; Nye vs. Liscombe, 21 Pick., 265; Green vs. Farmers' etc. Bank, 25 Conn., 452; Lovejoy vs. Albee, 33 Me., 414; Baxter vs. Vincent, 6 Vt., 614; Cronin vs. Foster, 13 R. I., 196; Jones vs. Winchester, 6 N. H., 497; Sawyer vs. Thompson, 4 Fost., 510; Lawrence vs. Smith, 45 N. H., 533; Bates vs. New Orleans etc. R. Co., 4 Abb. Pr., 72; Willet vs. Equitable Ins. Co., 10 Abb. Pr., 195; Towle vs. Wilder, 57 Vt., 622; Danforth vs. Penny, 3 Metc., 564; Gold vs. Housatonic R. Co., 1 Gray, 424; Larkin vs. Wilson, 106 Mass., 120; Smith vs. Boston, C. & M. R. Co., 33 N. H., 337; Myer vs. L. & L. & G. Ins. Co., 40 Md., 595.

On the other hand, the defendant, protesting against a double condemnation, insists that, inasmuch as the defendant, a party to the insurance contract, is subject to the laws of the State of Illinois, it has no choice but to submit to the decisions of its courts construing and applying the same. It is contended that while it is true, as a general rule, that the situs of a debt must be either at the domicile of the creditor or at the place where it is payable, yet that this is not an absolute rule, and may be varied by express legislation; that the States may legislate thereon according to their own view of their interests; that the suits in Illinois, having been first commenced, the court there has acquired control of the subject; and that, whether its decision be right or wrong, it is conclusive, and must be followed here. And the following cases are relied on in support of this argument: Moore vs. Wayne Circuit Judge, 55 Mich., 84; s. c., 20 N. W. Rep., 801; Pennoyer vs. Neff, 95 U. S., 714; Roche vs. Insurance Co., 2 Bradw., 360; Hannibal & St. J. R. Co. vs. Crane, 102 Ill., 249; Fithian vs. New York & E. R. Co., 31 Pa. St., 114; Barr vs. King, 96 Pa. St., 485; Childs vs. Digby, 24 Pa. St., 23; Mooney vs. Union Pac. Ry., 9 Amer. & Eng. C. Cas., 131; s. c., 14 N. W. Rep., 343; Burlington & M. Ry. vs. Thompson, 18 Cent. Law J., 192; s. c., 1 Pac. Rep., 622; Eichelburger vs. Pittsburgh etc. Ry., 9 Amer. & Eng. R. Cas., 158; McAllister vs. Pennsylvania Ins. Co., 28 Mo., 214; National Bank vs. Huntington, 129 Mass., 444; Myer vs. Liverpool & L. & G. Ins. Co., 40 Md., 601; Brausser vs. New England Fire Ins. Co., 21 Wis., 512.

There has been a great difference of opinion upon the subject, and, after attending to the variations in the facts of particular cases, it still remains impossible to reconcile the authorities. Nothing in the federal decisions seems controlling. The statement already made, of the positions of the parties here, presents the main features

of the reasons and arguments employed for reaching the different conclusions. It is not necessary to go over the ground again in this case. Unquestionably, it is a point of great difficulty, and I have been struck with doubt at various steps in advancing to a decision.

Some of the cases go very far in support of the defense here, notably the Kansas case (18 Cent. Law J., 192), where a railroad corporation, organized and having its principal place of business in Nebraska, but whose line extended into Kansas, was garnished for a debt due one of its employes for wages, in the courts of Kansas, at the suit of a creditor of the employe. The employe resided in Nebraska, had earned the wages there, and those wages were exempt to him and his family by the laws of that State. No service of process was had on the principal defendant. It did not appear that the plaintiff was a resident of Kansas, yet the supreme court of that State held that the debt was rightly garnished there: *Burlington etc. Ry. Co. vs. Thompson*, *supra* (January, 1884).

I do not presume to say that the case was erroneously decided, but, with the utmost deference to that court, it seems to me that the decision is open to grave criticism. It appears to me that the suggestion that a defendant, entering, for the purpose of doing business, a State where he is liable to a judgment subject to be duplicated elsewhere, and the debt twice collected, takes the risk of such consequences, is one of the last to be made in the administration of justice in an enlightened State, and ought only to be mentioned as a catastrophe found unavoidable after all legal reasoning had failed. It does not seem to be consonant with our interstate relations, and the general principles of jurisprudence which ought to prevail for common justice and harmony; and one could not help feeling doubtful whether the reasoning leading to such a result could be sound. And if, in the present case, it did not appear that the plaintiffs in the Illinois suits were citizens of that State, I could not agree that the judgment there was upon a subject within the jurisdiction of the court. But it does in fact appear that the parties who sued there were citizens of Chicago, and certain legal consequences arise from that circumstance which have weight in the discussion. The debts for which those parties brought suit were choses in action, which, in legal theory, attached to the domicile of the creditors there. It might be competent for the State to legislate in behalf of its own citizens owning such choses in action, so as to enable them to reach any assets of the debtor which the legislature, by changing the com-

mon-law theory of their situs, could localize there; and that the debtor, by creating the debt in that State, and contracting such relations with its citizens, ought to be regarded as having consented to such regulations for its collection, or, at least, as having no just reason for complaining of them. And, if it were necessary to support the judgment, I should be required to presume that the judgment was payable there. I am inclined to the opinion that, although the bounds of comity are rather severely strained by this course, it may be pursued consistently with established principles. There are two considerations touching the abstract merits which incline me to adopt this view in a doubtful case; First, the one already alluded to, that we thus avoid imposing a double liability upon a party whose good faith is not questioned; and second, the property has gone to pay a just debt of the plaintiff, and she has received the benefit of it. These circumstances could not turn a clear case. It is said to have been held by Blodgett, D. J., that the liability of an insurance company to garnishment does not arise in Illinois until after adjustment. The contrary appears to have been held in the State court in this case. If this was error, it was error merely, and, if the court had jurisdiction, could only be corrected there.

On so close a question I shall deny the motion, without costs, and without prejudice to a new motion, if the plaintiffs shall elect to make it when the circuit justice of the supreme court, or the circuit judge, shall preside here.

SUPREME COURT OF NORTH CAROLINA.

GREEN COUNTY.

FEBRUARY TERM, 1874.

YANCY T. ORMOND,

vs.

FIDELITY MUTUAL LIFE ASSOCIATION.)

The application, which was made part of the contract, provided that under no circumstances should it be in force until the annual dues had been paid. The policy recited that "Whereas the first payment * * having first been received" etc., while attached to it was a blank form of receipt referring to the policy and application for the terms of agreement, and reciting how it must be signed to be valid and that cash or its equivalent must be given in exchange.

Held, That a delivery by the agent was not a waiver of prepayment of premium, the agent had no authority to waive such payment, and the knowledge of the fact was sufficiently brought to the attention of the applicant.

Statement of Agreed Facts.

The plaintiff and Margaret A. Ormond, on the 13th of November 1884, made application for a policy of insurance in the defendant's company upon the life of Margaret A. Ormond for the benefit of the plaintiff, a copy of which application is hereto annexed as a part of this agreement; that said application was taken by one Thomas McGee, an agent of the defendant, and when the application was taken the plaintiff asked said agent when he would have to pay membership fee and first year's dues, and the agent replied that it was customary to pay when the application was made, but sometimes paid when the policy was delivered, and the plaintiff said he would

pay when the policy was delivered. The agent McGee knew that the plaintiff was a man of high financial and social standing, and was satisfied that payment would be made when called for.

The agent, McGee, took the application to the general agents of the defendant, Midgette & McCullen, to whom the standing of the plaintiff was well known, and informed them of the circumstances attending the making of the application; said general agents forwarded the application to the home office in Philadelphia; and on the 19th day of November, 1884, it issued the policy hereto annexed, and forwarded the same to the general agents, who, on the 24th of November, forwarded the same by mail to the plaintiff at Hookerton without condition or explanation, or saying anything about the payment of the membership fee and first year's dues, inclosing therewith a receipt—a copy of which is hereto annexed.

On the afternoon of the 16th day of November, 1884, said Margaret A. Ormond was taken sick and a medical attendant was called to her on the 19th, and on the 21st it was discovered that she had pneumonia, from which she died on the 23d, having been confined to her bed from her first sickness on the 16th; that her sickness was not of such a nature as to cause any apprehension in her own mind or the minds of the members of the family, until the 19th. By the only mail route from the post-office of plaintiff and said Margaret A. Ormond, a letter mailed at said post-office on the 16th, 17th, or 18th of November, would have reached Philadelphia on the 19th, or Kinston, where the general agents reside, on the 20th. One mailed on the 19th or 20th would have reached Philadelphia on the 21st, or Kinston on the 22d; one mailed on the 20th or 21st, would have reached Philadelphia on the 22d, there being a tri-weekly mail from her post-office to Goldsboro, N. C., on Tuesday, Thursday, and Saturday. No notice was given the defendants of the sickness of Margaret A. Ormond until the 27th of November. The plaintiff having received the policy on the 25th day of November through the mail as stated, took the same on the 27th of November to the general agents, informed them of the sickness and death and the circumstances attending it, and asked them if the policy was all right; and they informed him that it was, and he paid them the membership fee and first year's dues, and they countersigned the receipt for the fee and dues, and at the suggestion of said agents sent forward notice of death. Afterwards during the same day one of the agents saw the plaintiff and told him he was not sure that the policy was good. On the 8th of December, 1884, in consequence of a notice

from the general agents the plaintiff went to their office, and they informed him that they had been notified by the defendants to return to him the money, stating at the same time that they did not think it was necessary, but the plaintiff could take the money, and if his claim was established he could return the money. Upon this assurance, without intending to waive any right he took the money.

The general agents, Midgette & McCullen, were managers for the State of North Carolina and South Carolina, and had authority to solicit and forward applications for insurance, receive and receipt for membership fees and first annual dues by countersigning receipts signed by the president and treasurer, to deliver policies, and appoint sub-agents.

J. W. BRYAN and MUNROE & ROBINSON, *for Plaintiff.*

J. E. JACKSON, and W. S. CAMPBELL, *for Defendant.*

SMITH, C. J.

Among the clauses found in the application made with the by-laws and by express words in the policy a part, is the following:—

3. "That under no circumstances shall the policy hereby applied for be in force until the actual payment to and acceptance of the annual dues by the association or its authorized agent, during the lifetime and good health of the party who is proposed for membership and insurance." The policy itself contains a recital charge declaring, "and whereas the first payment of such annual dues having first been received by the treasurer or an accredited agent of the association," etc. Accompanying the policy and attached to it is the form of a receipt used by the company in these words:—

The Fidelity Mutual Life Association,
Of Philadelphia, Pa.,
Office 908 Chestnut St.

PHILADELPHIA, November 19, 1884.

Received from the owner of policy No. 6,934 on the life term, fifteen dollars for the annual dues, due the 19th day of November, 1884.

For terms of mutual agreement, see application and policy.

A. THACHER, Treasurer,
L. G. FOUSE, President.

At the foot of the receipt and in the left corner is the following:—

NOTICE TO POLICY-HOLDERS.

This receipt to be valid must be signed by the president or treasurer of the association, and in exchange therefor, cash or its equivalent be given by the holder of the policy at the date hereof, or within three days allowed by the association.

And when payment hereon is made to an authorized agent, such agent must countersign at the date of paying, as an evidence of payment to him.

Beneath the acknowledgement is this:—

Countersigned at.....Agent.

but without any signature of the agent.

This policy thus with the attached receipt plainly declares that the required precedent payment has not been made and must be paid to the agent before the contract of insurance becomes complete and operative on the association and the policy becomes effectual. Indeed the recital seems to contemplate the payment as an essential consideration of a valid delivery by the agents to whom the policy was sent. Moreover, this must be “during the lifetime and good health” of the party to be insured.

The policy incorporating with it the other papers by reference if it be deemed effectual from its date, and the delivery of in the manner stated effectual, constitutes the contract between the parties by which their respective rights and obligations are to be ascertained and the dues were not paid until four days after the death of the insured. This certainly was not a compliance with the fundamental conditions on which its validity was dependent.

The plaintiff insists that the initiatory payment was dispensed with and waived by the soliciting agent at the time of taking the application; and if not then, by the unqualified transmission to him by the general agents of the policy received by them.

The facts do not warrant this contention. The plaintiff in answer to his inquiry of the agent McGee, when he would be required to pay, was informed that payments were sometimes made at the taking the application and sometimes when the policy was delivered, and in exercising his discretion, the plaintiff said he would pay at the latter period. There was no waiver in the case, and the plaintiff, under the agent's advice was but availing himself of an allowed option—a conceded right.

There was no waiver by the general agents, nor had they authority to dispense with the prepayment, if indeed an inference of an intent to do so can be drawn from their act of forwarding the policy without countersigning the receipt. The actual receipt of the dues was indispensable to the efficacy of the insuring contract, and this being a provision in the application is brought to the knowledge of the plaintiff and forms part of his contract. In *Whitly vs. Life Ins. Co.* (71 N. C., 480) it is declared that a policy of life insurance is not binding until the premiums are paid, a clause

requiring prepayment being contained in the application; and further that any material change in the condition of the health of the insured intermediate and before the consummation of the contract by payment of the premiums, should be communicated to the company.

The clause under which the policy, and of course the contract consummated by its issue, becomes operative is an underlying and essential part of the agreement, and no agent can dispense with its agreement. The policy, as we interpret its recital, makes this a prerequisite to its taking effect by delivering as does the form of acknowledging payment. The plaintiff therefore knows that "actual payment" must be made, and that "under no circumstances" can the policy "be in force" without it is made.

We do not propose to enter upon other inquiries discussed with great learning and after much research on either side; such as the omission to give information of the sickness of the insured and the explanation offered for the refusal, and the period at which the contract became effective, and will only say, that as there are conditions in the policy not contained in the application, which constitute, after acceptance, part of the policy, it would seem that the plaintiff being at liberty to decline the added conditions, his assent to them would be necessary to a complete agreement without passing upon other matters, and put our decision in accordance with numerous rulings in adjudged cases upon the ground that the clause in the policy referred to constitutes a condition precedent, and the waiver relied on does not dispense with it.

There is no error, and the judgment is affirmed.

SUPREME COURT OF NEW HAMPSHIRE.

BALL

vs.

GRANITE STATE MUTUAL AID ASS'N.*

A condition in a certificate of membership in a mutual aid association, that it shall be null and void if any of the statements or answers made by the member in his application concerning his health are untrue, is waived if the certificate is issued by the association with actual knowledge of the condition of the applicant's health.

A mutual aid association is estopped to avoid a certificate of membership on the ground of erroneous statements contained in the application, if with full knowledge of all the facts, it has continued to recognize the certificate as a valid and subsisting contract by making and receiving subsequent assessments upon it.

JOHN H. ALBIN, *for Plaintiff.*

BATCHELDER and FAULKNER, *for Defendant.*

CLARK, J.

This is an action of debt upon a certificate of membership issued to Alvin W. Ball, dated November 30, 1883, wherein the defendant agreed to pay to the plaintiff if living, if not to the heir at law of Alvin W., "within sixty days after due proof of the death of said member, a sum equal to the amount received from one death assessment, but not to exceed \$5,000, provided said member continues to observe and comply with the covenants and conditions specified in this certificate during his life, otherwise the membership, with all moneys paid to the association and all claims against the same shall be forfeited, and this certificate shall be null and void." There was a verdict for the plaintiff for \$5,278.23.

* Decision rendered, March 11, 1887.

The certificate of membership upon which the action is founded, declares that it is issued and accepted under the covenants and conditions "that no misrepresentations have been made, no untrue answers given to the questions contained in the application, which is hereby made a part of this certificate and a warranty on the part of the said member and the beneficiary; no facts suppressed and fraud or deception used by the said member calculated to deceive or mislead the agent or officers of the association." The application contained the following clause: "It is hereby agreed that the above and foregoing application, with the declarations and statements therein made, shall form the basis of the contract by and between the above-named applicant and the Granite State Mutual Aid Association, and that if any of these statements and answers therein made are untrue and false, or any facts touching the health of the applicant are concealed, or any statements or untrue answers made tending to deceive the association, or if the applicant neglect to pay any of the assessments or annual payments; * * * that then in either event this contract shall become null and void, and all moneys which shall have been paid shall be forfeited and the policy issued to the applicant hereupon shall not be binding upon the association." In answer to questions contained in the application, Ball stated that he had never been afflicted with any disease of the lungs or throat, and that he was then free from all diseases and complaints to the best of his knowledge and belief. It is conceded that these answers were untrue, and that Ball then had, and for several years had to his knowledge had a disease called catarrh, by which both his throat and lungs were more or less affected, and his health impaired.

Unless these facts are controlled or modified by other circumstances the contract of insurance was void. The statements of Ball in answer to the inquiries in the application concerning his health, whether they are regarded as warranties or representations, were made conclusively material by the express agreement of the parties, and the policy was to be void if they were untrue, and it being conceded that they were untrue, the forfeiture contemplated by the agreement necessarily follows unless it has been waived: *May on Insurance*, § 206; *Jeffries vs. Life Ins. Co.*, 22 Wall., 47; *Ætna Life Ins. Co. vs. France*, 91 U. S., 510; *Frost vs. Ætna Life Ins. Co. of Hartford*, 61 N. Y., 571; *Bastian vs. Phoenix Ins. Co.*, 67 N. Y., 595; *Price vs. Phoenix Mut. Life Ins. Co.*, 17 Minn., 497; *Day vs. M. B. Life Ins. Co.*, *McArthur*, 41 (s. c., 29 Am. Rep., 565); *Von vs. Eagle Life and Health Ins. Co.*, 6 Cush., 42; *Miles vs. Conn. Mut. Life Ins.*

Co., 3 Gray, 580; *Campbell vs. N. E. Mut. Life Ins. Co.*, 98 Mass., 381; *Lowell vs. Mut. Fire Ins. Co.*, 8 Cush., 127; *Hartwell vs. Alabama Gold Life Ins. Co.*, 33 La. Ann., 1,353; *Thompson vs. Worms*, H. L., 9 Appa. Cas., 671 (s. c., 36); *Mooke's Eng. Rep.*, 228).

But it appears that in addition to the statements and answers of Ball, the application contained the certificate of the examining physician, in which he stated that Ball had catarrh, and had been subject to a catarrhal cough for many years, and that he considered him a medium risk. This certificate furnished by Ball as a part of his application and containing a true statement of the condition of his health was before the officers of the association when they accepted the risk, received the premium, and issued the policy. It was issued with the knowledge on the part of the association that the answers of Ball were not true in every particular if the certificate of the examining physician was correct, and under instructions that the plaintiff could recover, although Ball knew of the disease, if he made the answers accidentally and with no intention to misrepresent the facts or to deceive the defendants, the jury have found by their verdict that there was no intentional concealment or misrepresentation on the part of Ball.

It is not to be assumed that the association issued and received the premiums and assessments upon a policy which they knew to be worthless to the holder, and the acceptance of the risk with the knowledge that Ball had catarrh and had been subject to a catarrhal cough for years must be regarded either as an admission that catarrh was not such a disease of the lungs or throat as was contemplated in the application, or as a waiver of the condition that the inaccurate answers of Ball should avoid the contract. Issuing the policy with knowledge of the actual condition of the health of the insured was a waiver of the condition making an inaccurate statement as to his health an avoidance of the policy. And by treating the contract of insurance as valid and subsisting, by making and receiving subsequent assessments upon it with full knowledge of all the facts, the defendant is estopped to avoid it for erroneous statements in the application: *Appleton vs. Ins. Co.*, 59 N. H., 541; *Hadley vs. N. H. Ins. Co.*, 55 N. H., 110; *Barnes vs. Ins. Co.*, 45 N. H., 21; *Horn vs. Cole*, 51 N. H., 287; *Insurance Co. vs. Wolf*, 95 U. S., 321; *Van Schoick vs. Niagara F. I. Co.*, 68 N. Y., 434, 436; *Momson vs. Wisconsin Odd Fellows M. L. Ins. Co.*, 59 Wis., 163, 168; *Schwarzbach vs. Ohio Valley Protective Union*, 25 West Va., 622, 665, C.

The court finds that there was no evidence tending to show the amount received from one death assessment and, subject to exception, the jury were instructed to return a verdict for \$5,000, with interest after sixty days from the proof of Ball's death, in case they found for the plaintiff. This was error. The plaintiff was entitled to a sum equal to the amount received from one death assessment. If there was no evidence to show what that sum was, he could recover only nominal damages.

The condition in the policy that the sum recovered should not exceed \$5,000 was not evidence that the sum received from one death assessment would amount to \$5,000. New trial.

Carpenter, J., did not sit; the others concurred.

SUPREME COURT OF MICHIGAN.

EMPLOYERS' LIABILITY ASSUR. CO. }

vs. }

COMMISSIONER OF INSURANCE. }

A British company which has deposited \$100,000 in New York, as there required, is not thereby exempted from the deposit required in Michigan under the law which exempts in case of a deposit in the State where organized. The license of a foreign company to do business in New York cannot be deemed as constituting that State the place of organization.

CAMPBELL, C. J.

Relator, a British company, applied to the insurance commissioner for a license to transact business in this State, which he refused to allow without a deposit of securities to the amount of \$100,000, which is required by statute where no similar deposit has been made at such other place as is contemplated by law. Relator showed proper evidence that such a deposit had been made in the State of New York upon the conditions required by our legislation. The only question is whether, under the statute which governs the case, and which was fully discussed on the argument, a deposit in New York is a sufficient compliance. The statute (Laws 1881, p. 279) requires a deposit of at least \$100,000 with the State treasurer of this State, or with the chief financial officer or commissioner of insurance of the State where such company or association is organized, duly assigned to such officer in trust for the benefit of all policy-holders. Said deposit shall consist of bonds or stocks of the United States, or of the State where such company or association is organized, or of bonds and mortgages on improved unincumbered real estate worth

* Decision rendered, January 27, 1887.

double the sum loaned thereon. It is not disputed that the statute designs to allow licenses to companies formed under the laws of foreign governments, as well as those created in other States of the Union. They are all covered expressly by more than one section of the statute. But the right to rely on a deposit of securities elsewhere is in terms confined to deposits in the State in which a company is "organized." It is not claimed that this relator was organized in New York; but it is insisted that obtaining authority to do business satisfied sufficiently the essentials of organization. It is further claimed that the insurance department has practically construed this statute by licensing companies on that theory, and that the present commissioner had done the same thing until his attention was directed to the question in such a way as to lead him to doubt its correctness.

Much respect is due to practical construction when it does no violence to language, and has been so long continued as to show general acquiescence; but in this case the present refusal is from the same officer whose predecessors have given the other construction, and who has refused to recognize it. The law has not been in force long enough to make it evident that this construction has been brought home to the attention of the various departments of the government, and approved by their acquiescence. It would require a very clear case of practical acquiescence to authorize us to compel the head of a bureau to follow precedents which he does not himself regard as binding, unless they are at least so harmonious with the language of the law as to create no repugnance to it. We cannot avoid the necessity of looking at the statute itself. When we do this, we find that it does not group together under one name or class all companies not originating in Michigan, but divides them more than once into companies of other States and foreign countries. The use of the word "States" is manifestly confined to our own communities within the United States. In one sense, nations are often and properly designated as States; but, where companies formed under the laws of foreign governments are mentioned as distinct from companies of other States, we cannot suppose the repetition and distinction are meaningless. If no difference was intended to be recognized, the language used is very inappropriate.

When, after mentioning both of these classes, the legislature proceeded to provide that companies which had deposited securities to the amount of \$100,000 in the proper custody in the States in which they were organized need make no deposit here, we must assume

the omission to cover foreign companies by this exemption was intentional. We may not be able to tell just what reasons influenced the legislature, but it is easy to see differences which might have been considered. The object of providing the deposit is to secure a fund to which our citizens may have convenient access for indemnity for their unpaid losses. A deposit abroad would be of no practical use to them in most cases, because not readily accessible. If we give the word "State" a sense which will include a foreign nation, the language of the statute would require the deposit to be made in the foreign State to which the company belonged. That would not help this relator, because the deposit is in New York, and not in Great Britain. It is therefore claimed that what the statute means is that the deposit should be made in another American State, but that the word "organized" may mean licensed to do business. This is not a natural meaning. A British company may be licensed to do business in every State in the Union. Under the interpretation claimed, it might have a single deposit in any of the States. So a New York company might be licensed in every State. This same construction would allow the deposit of that company to be made anywhere else as well as in New York. But, if the statute said nothing about foreign companies, no one would imagine that an American company could be treated as organized anywhere but in its home State. Language which is so plain and definite when so applied cannot be made to mean something else, and applied to objects which in no way fulfill its conditions.

If there were no way in which foreign companies could otherwise get a license here at all under this statute, which expressly covers them, we might be called on to devise some construction which would save the whole statute. This is a rather dangerous process, and if allowable at all, can only be made so by necessity. But here there is no such necessity. They can get it by making a deposit here. The conditions on which companies can be exempted from this general rule are expressly confined to American companies, and can reach no others. It is not our province to speculate on the possible view which may have influenced the legislature. It was within their discretion to impose these conditions. If they acted inadvertently, they can very easily remit them. But we have no such power.

The mandamus must be denied.

The other justices concurred.

SUPREME COURT OF PENNSYLVANIA.

Error to Common Pleas, Mercer County.

HAWS

vs.

FIRE ASSOCIATION OF PHILADELPHIA.*

The policy insured horses against fire, "all contained in ** frame barn, situated etc." A lightning-clause was attached stipulating that it insured against damage from lightning, "subject in all other respects to the terms and conditions of the policy." A mare was killed while pasturing in a field on the farm.

Held, That the clause must be construed as referring only to such terms and conditions as were applicable to it.

Held, That the insurance against lightning contemplated a danger existing chiefly at a season when the stock are usually much in the fields, and hence covered the animal while in the field.

S. GRIFFITH & SONS and E. P. GILLESPIE, *for Plaintiff in Error.*

S. F. THOMPSON and SAM'L REDMOND, *for Defendant in Error.*

PAIXON, J.

This was an action upon a written contract of insurance to recover for the loss of a brood-mare killed by lightning. The defendant company had insured a number of the plaintiff's horses against loss by fire. They were described as "all contained in his new, two-story, frame barn situated on his farm in Haupfield Township, Mercer County, Pa." This policy was in the usual form of fire policies covering insurance upon either personal or real estate. Attached to it was what has been designated as the "lightning-clause," which follows: "Attached to policy No. 447,840, of the Fire Association of Philadelphia, agency at Greenville, Pa. It is hereby specially agreed that this contract insures against any loss or damage caused by lightning to the property insured, not exceeding the sum insured."

* Decision rendered, November 15, 1886.

nor the interest of the assured in the property, and subject, in all other respects, to the terms and conditions of the policy hereby referred to," etc.

The mare referred to was killed by lightning while pasturing on a field of plaintiff's farm. The court below instructed the jury that "we are brought to the conclusion, in view of this writing made by one party, and accepted by the other, which is the law between them in this case, that the plaintiff cannot recover, in view of the fact that his property was killed when not in the barn." This ruling forms the subject of the first assignment of error.

It is to be noted that the lightning-clause, as it is called, is subject "to the terms and conditions of the policy referred to." What does this expression mean? We think the rational construction of it is that it refers only to such terms and conditions of the policy as are applicable to this particular insurance; that is, insurance against lightning. It would be irrational to apply the terms and conditions of the policy which refer only to insurances upon buildings. Such insurance was not the subject-matter of the contract, and the parties cannot, by any fair rule of interpretation, be presumed to have had such conditions in view when the insurance was effected.

In *Grandin vs. Insurance Co.* (107 Pa. St., 26) the insurance was upon oil in the pipe-lines, and the company defended upon the ground, in part, that the plaintiff was not the "sole, absolute, and unconditional owner" of the oil, as required by one of the conditions of the policy. This court held that if the insurance had been upon a horse, a house, or a stock of merchandise, there would have been some force in the proposition assumed by the company; but, for the reasons there given, ruled that the condition had no meaning or application to an insurance upon oil in pipe-lines. It was said in the opinion of the court: "We have here a number of conditions which, as applied to this particular contract of insurance, are meaningless. It would be absurd to attempt to give them any force or effect. The insurance itself is of a peculiar character. The form of policy is one in general use in ordinary contracts of insurance upon ordinary property. Many of its conditions are admittedly inapplicable to this kind of insurance. Under such circumstances, when it is attempted to defeat a recovery upon the ground that, under one of its conditions, the policy is void, we are driven to an examination of the character of the condition, and the reason upon which it is founded, in order to ascertain whether it could have been in the contemplation of the parties when the contract of insurance was

made. The necessity for this arises from the act of the defendant company in issuing a policy not adapted to the subject-matter of insurance, and containing so many incongruous conditions."

The policy, as before stated, describes the property as "contained in his two-story, frame barn," etc. Was this intended as a promissory contract or warranty that the horses were to be kept all the time in the barn, and that the policy should cease to cover them the moment they left its shelter? We must take a reasonable, common-sense view of the contract, and by so doing we shall best arrive at what the parties actually intended. We have here a farmer insuring his horses against lightning. He was contracting for indemnity in case his horses should be killed. He knew, as every man of average intelligence knows, that the danger from lightning exists almost wholly in the summer season. That is a period of the year when stock of all kinds upon farms is left in the fields, much of the time, by day and by night. A policy of insurance which only covered stock when in the barn would not furnish indemnity, and no man of common sense would insure in such a company.

It is true, in an insurance upon such personal property as household goods or a stock of merchandise, the words "contained in" a particular building would seem to imply that the property insured should remain in such building; and that, if removed therefrom, the policy would not cover it. But in such cases the contract contemplates that the property shall remain in the building, and there are obvious reasons why a change of location would affect the insurance. The very nature of such property implies permanency in its location. But it is not so with a man's horse. It is of no use to him if kept in a stable. We can understand that if, in a fire policy, hay, straw, or grain is insured in a barn, the insurance would cease if removed to some other building. Such would be the reasonable meaning to the contract of insurance, and what the parties probably contemplated when they made it. But none of this reasoning applies to a lightning-clause upon horses or other stock. The terms and conditions to which such an insurance is subject must be such as are reasonably applicable to such kind of insurance upon this particular species of property, and such, therefore, as the parties may be presumed to have had in view when the contract was made. This disposes of the first assignment of error.

We also sustain the second. It was error to instruct the jury to find for the defendant.

Judgment reversed, and a venire facias de novo awarded.

SUPREME COURT OF ILLINOIS.

Appeal from Appellate Court, Third District.

NORTHWESTERN BENEV. & AID ASS'N
 vs.
 HALL.*

Issues involved questions and answers in the application as to the general health of the applicant, the use of alcoholic stimulants, and whether ever got drunk; it was also claimed that the insured committed suicide the use of poison, but there was no positive proof.

That the issues were questions of fact, and a finding in the court below is conclusive.

That in such issues the possible action of the company in case other answers had been made in the application is not admissible.

MCNULTA & WELDON and HAMILTON SPENCER, *for Appellant.*

MCNULTA & BEAVER, *for Appellee.*

MAGEUDER, J.

This is an action of assumpsit, brought by appellee, who is the widow of one Benjamin T. Hall, deceased, against appellant, in the circuit court of McLean County, upon a certificate of membership in appellant company bearing date September 27, 1884, for the sum of \$2,000, issued to the said Benjamin T. Hall. The circuit court, after a trial of the cause by agreement, without a jury, rendered judgment in favor of appellee for \$2,000 and costs. This judgment, on appeal, has been affirmed by the appellate court of the third district, and appellant company prosecutes its further appeal to this court.

Decision rendered, October 6, 1886.

The certificate in question was, in effect, a policy of insurance upon the life of the deceased Hall. It certifies that he is entitled to all the rights and privilege of membership in appellant company, and to participate in the beneficiary or relief fund of the association, to the amount of \$2,000, "which sum, or such part thereof as may be collected as specified in the constitution and by-laws of the association, shall, within sixty days after his death, be paid to his wife, Mary J. Hall." It also recites that it is issued upon condition that Hall "shall comply with the constitution and by-laws of the association, and that the statements in the application for this certificate are true." Hall died December 4, 1884, and proofs of his death were made by January 2, 1885.

The application referred to, which was signed by Hall, contained, among others, the following questions and answers: "Question. Has your general health been uniformly good for the past ten years? Answer. Yes. Q. Do you use alcoholic or other stimulants? A. No. Q. If so, do you drink regularly? A. Not at all. Q. Do you ever get drunk? A. No." In the application Hall agreed that such "application and declaration" should be the basis of the contract between him and the association, "and, that if any misrepresentation or fraudulent or untrue answers have been made, or any facts which should have been stated have been suppressed, if death should result from suicide, etc.," then the agreement should be void, and the moneys paid should be forfeited. He also therein declared that he had made full and correct answers to all the questions, and warranted such answers to be true and complete statements of all material facts within his knowledge; and agreed that if he should, at any time, impair his health by immoral practices, or the excessive use of alcoholic stimulants or narcotics, the contract should be void.

Upon the issues made in the case, the questions presented for the decision of the trial court were purely questions of fact. They were: (1) Was the condition of health of the insured uniformly good for the space of ten years next before his application for membership? (2) Were the habits of the deceased, as to the use of alcoholic liquors, such as to amount to a breach of his contract? (3) Did the deceased commit suicide?

The appellant sought to show that Hall poisoned himself by taking strychnine. There was no positive proof that he had taken such a poison. There was proof tending to show that the pains in his head of which he complained, and the spasms which immediately preceded his death, may have been caused by some other disease,—not

the result of strychnia poison. It is not claimed that there was any examination of his stomach by a chemist after his decease, and the expert testimony tends to show that such an examination was the only absolutely certain test of the presence of strychnia.

The questions of fact so presented to the circuit court were decided against appellant. As the appellate court has affirmed the judgment of the circuit court, it must, of necessity, have found that the evidence sustained the judgment of the trial court. Such finding is conclusive upon us: *Germania Fire Ins. Co. vs. McKee*, 94 Ill., 498. The appellant did not, as it had a right to do, under the forty-second section of the practice act, submit to the trial court "written propositions, to be held as law in the decision of the case." Where there is a trial before the court without a jury, in order to present a question of law to this court as having been passed upon by the court below, the party should submit propositions of law to the trial court, as provided for in the section referred to: *Tibballs vs. Libby*, 97 Ill., 552; *Hobbs vs. Ferguson's Estate*, 100 Ill., 232. As this was not done, there is nothing for us to consider except the point hereinafter stated.

A physician who was the medical expert of appellant, was asked several questions, to which objection was made and sustained. They were, in substance, whether Hall's application for membership in the association would have been favorably passed upon if it had been stated in such application that he drank liquor. We think that the objections to these questions were properly sustained. The real issue was whether the statements made in the application were true or false. What would have been the effect if some different statement from that therein contained had been made to the association, was of no consequence. The witness might give his opinion on a matter of science connected with his profession, but he could not be allowed to state his views of the manner in which others would probably be influenced if certain specified facts existed. Testimony called for by the questions of a similar character has been held to be improper in the following cases: *Washington Life Ins. Co. vs. Haney*, 10 Kan., 525; *Rawls vs. American Mut. Life Ins. Co.*, 27 N. Y., 282; *Durrell vs. Bederley*, 1 Holt, 283; *Campbell vs. Rickards*, 5 Barn. & Adol., 840.

The judgment of the appellate court is affirmed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS

WILSON

vs.

NEW HAMPSHIRE FIRE INS. CO.*

A, acting under instructions from B to procure insurance upon certain property in some good company, applied to C, an agent of the U. Co. C delivered to A a policy, countersigned by C, in the U. Co. A then delivered the policy to the plaintiff, B. Afterwards, on April 23, 1883, was instructed by the U. Co. to cancel the policy. C then entered the risk in the policy-register of the defendant company, and wrote the policy in suit, immediately notifying the defendant of the same. On April 24, 1883, the building insured was burned, and on the same morning C, who had no knowledge of the loss, mailed the policy in the defendant company to A, accompanied by a letter dated April 27th, informing him that the U. Co. had declined the risk, and requested an exchange of policies. On the day the letter was sent to A containing the policy in the defendant company, C received a letter from defendant, dated April 26th, declining the risk. On the same day, April 26th, A notified C of the loss by telegram, after the receipt of the policy by A, and C received the telegram. On the same afternoon C, after receiving defendant's letter declining the risk, went to the place where the property was located, and the plaintiff at the request of A, handed the policy in the U. Co. to A, and accepted the policy in the defendant company in exchange. Each company returned to plaintiff the premiums paid, and refused to pay the loss.

Held, That the plaintiff could not recover the amount of his policy from the defendant company.

This was an action of contract upon a policy of insurance against loss by fire. The case was submitted to this court upon the following agreed facts :—

Homer C. Strong, an insurance broker, on April 12, 1883, in accordance with instructions from the plaintiff, applied to S. C. Warriner, an insurance agent, for a policy of insurance of \$2,000,

* Opinion filed, October 24, 1885.—From *Northeastern Reporter*.

good company, on the plaintiff's block then in process of erection in Palmer. Warriner at once delivered to Strong a policy, assigned by the former as agent of the Union Insurance Company of Philadelphia, Pennsylvania, duly executed by that company, insuring the plaintiff against loss by fire from April 13, 1883, for three years, in the sum of \$2,000, on the property in Palmer. Warriner then delivered the policy to the plaintiff, who accepted it, and Warriner charged the premium to Strong, with whom he had an account, and credited the same to the company. On April 13, 1883, Warriner received from the company a letter instructing him to cancel the policy. He entered the risk on the policy-register of the defendant company, and wrote a policy in the same form and for the same amount and premium, as the other policy, in the defendant company, whom he immediately notified of the same. Printed portions of both policies were in the form required by the act, c. 119, p. 139. At the time when he wrote the policy in the defendant company, Warriner credited the company with the premium, according to the custom in such cases. On April 28, 1883, the building insured was destroyed by fire, about 1 o'clock in the morning. About 7 o'clock on the same morning Warriner, who had no knowledge of the loss, mailed a letter to Strong, dated April 28, enclosing the policy in the defendant company, and requesting an exchange of policies, which was received by Strong on the same day. On April 26, 1883, the defendant wrote to Warriner, denying the risk, which letter was received by him on April 28th, after which he mailed the policy to Strong. On the morning of April 28th, Warriner notified Strong by telegraph of the loss, after the receipt of the policy by Strong, and Warriner received the telegram. In the afternoon of April 28th, Warriner went to Palmer, and the next day, at Strong's request, and in the presence of Warriner, he delivered the policy in the Union Company to Strong, and accepted a new policy in the defendant company in exchange; and Strong delivered the first-named policy to Warriner, with the understanding that the plaintiff's rights were not to be prejudiced in case the policy in the defendant company did not hold. Warriner wrote to both companies stating the facts; and proofs of loss were duly made to both by the plaintiff. Both companies returned the premium to Warriner, and both refused to pay the

judgment in the superior court was for the defendant, and the plaintiff appealed.

G. M. STEARNS and H. C. STRONG, *for Plaintiff.*
WIGGIN & FAUNCE, *for Defendant.*

ALLEN, J.

The contract between the plaintiff and the Union Insurance Company was complete on April 13th. Strong's authority was to procure insurance to the amount of \$2,000 in some good company; and having done that to the acceptance of the plaintiff, his agency was accomplished, and he had no authority to surrender the policy, or to make further insurance in behalf of the plaintiff. Warriner could have no authority to act for the plaintiff, except what Strong was authorized to give him. When Warriner, on April 23d, received instructions from the Union Company to cancel the policy, he did not give the ten days' notice, which was the only way in which the company could cancel the policy without the consent of the plaintiff; but he attempted to procure the surrender of the policy by the plaintiff, and the acceptance of a policy in the defendant company in the place of it. His letter of April 27th was a proposal to the plaintiff which neither Warriner nor Strong had authority to accept. It was for the plaintiff alone to say whether he would retain the policy he held, or surrender it in exchange for the other. Until he should consent, the first policy would remain in force, and the second would not become operative. There was no acceptance of the proposal, and no contract between the plaintiff and the defendant company, before the interview between Warriner, Strong, and the plaintiff, on April 28th. Before that time, the authority of Warriner to make the contract and deliver the policy for the defendant had been revoked, not only by the letter of April 26th which had before then been received by him, but by the loss of the property to be insured; and an acceptance of the defendant's policy by the plaintiff would not bind the defendant: *Massasoit Steam Mills Co. vs. Western Assur. Co.*, 125 Mass., 110; *Stebbins vs. Lancashire Ins. Co.*, 60 N. H., 65.

Judgment for the defendant.

COURT OF APPEALS OF NEW YORK.

B. ELLSWORTH ET AL., *Respondents*,
 vs.
 AETNA INSURANCE CO., *Appellant*.*

Inventory of stock was made at the time the insured purchased the business from other parties some time previous to the fire, and it appeared that a considerable part of that stock remained on hand at the time of the fire. That the inventory was admissible to aid in determining the value of goods enumerated therein which constituted a part of the stock.

vs. M. HUMPHREY, *for Appellant*.
 L. WALKER, *for Respondent*.

PER CURIAM.

The principal error alleged relates to the admission in evidence of the objection of the defendant, first, of the inventory made in November, 1872, about ten months before the fire, on the sale by Bennett & Bean to the plaintiff, Isaac B. Ellsworth, of the goods and fixtures of Bennett & Bean, and second, of the inventory made by Ellsworth & Son, September 23, a few days before the fire, of the stock then on hand. The admissibility of this evidence is to be determined in view of the circumstances. Upon the issues as found, it was incumbent on the plaintiffs to show the amount and value of the goods

of the plaintiffs, after the purchase from Bennett & Bean, continued in business to the time of the fire, selling from the stock purchased of that firm, and from new stock purchased from time to time which was mingled with the old stock. The Bennett & Bean

Decision rendered, March 25, 1887.

inventory was taken by the members of that firm, assisted by the plaintiffs and one Bowie, and was entered in a book, the articles being stated in detail, with the cost price. The sale to Ellsworth was made upon the inventory, for the net cost, \$7,740.07. The book containing the inventory was delivered to and kept by the plaintiffs in the safe in the store. The inventory of September, 10, 1873, was entered in pass-books, the goods being classified, and the cost of each article in each class was given, and footings of the aggregate cost of each class was made. These footings, aggregating \$6,325.25, were transferred by the plaintiffs and entered in the inventory book containing the Bennett & Bean inventory. The pass-books and the bills of purchase were kept in a desk and were with other books and papers destroyed by the fire. The inventory book kept in the safe was not burned. The trial occurred nine years after the fire. The plaintiffs were severally sworn as witnesses in their own behalf, and testified as to the particulars of the loss, so far as they could recall them. It appeared from their testimony that many of the goods purchased of Bennett & Bean, and specified in the inventory of 1872, were in the stock at the time of the fire, and they enumerated a large number of articles bought of Bennett & Bean, then on hand. But they were unable to specify the exact quantities, or the exact cost from recollection. The same is true as to the new goods. Under these circumstances, the court admitted the Bennett & Bean inventory in evidence, as bearing upon the value of the classes of goods embraced therein, which were in the stock and were burned at the time of the fire, and the court also admitted the footings of the inventory of September 10, 1873, to be read from the Bennett & Bean inventory book. The admission of the Bennett & Bean inventory was not at the time it was admitted restricted in terms to the purpose named, but it was so limited in the charge. We think both this inventory and the footings of the second inventory were properly admitted.

The plaintiffs labored under great embarrassment in making out their case, owing to the burning of papers and memoranda, and the lapse of time, and seem to have given the best evidence bearing upon the issue at their command. The Bennett & Bean inventory showed what goods were purchased by Ellsworth, and their cost to Bennett & Bean, and also the prices paid by Ellsworth, matters as to which the plaintiffs had no certain, specific recollection. The price paid ten months before the fire, for goods burned

was some evidence of their value at the time of the fire. The footings of the inventory of September 10, 1873, were authenticated by the testimony of both the plaintiffs as correct footings of the inventory contained in the pass-books, and they testified that they represented the cost of the goods. It is true that the evidence as to the quality or value of the goods burned, was not very satisfactory, and the jury, as their verdict indicates, were of this opinion. But we think the rules of evidence were not violated.

There are no other questions requiring special notice.

The order appealed from should be affirmed. All concur.

SUPREME COURT OF NEW HAMPSHIRE.

CITY SAVINGS BANK

vs.

WHITTLE.*

The beneficial interest in a policy of insurance procured by a father on his son for the benefit of and payable to his minor son, vests in the son upon the delivery of the policy, and a subsequent assignment of the policy by the father as security for his own debt conveys no title. If the son joins in the assignment he may avoid it, but he must pay the assignee the premium necessarily paid by him to keep the policy in force while it was right in his possession.

Damages may be apportioned among several defendants by separate judgments, if justice will be done by such procedure.

Assumpsit to recover the amount of a note for \$2,500, signed by the defendants Joshua F. Whittle and Harry F. Whittle, dated March 6, 1877; and also three sums paid by the plaintiff at different times for premiums on a policy for \$5,000, in the Home Life Insurance Company, on the life of J. F. Whittle, amounting to \$270. This policy was an endowment policy which became due in 1886, procured by J. F. Whittle for the benefit of H. F. Whittle, who was his son, and made payable to the son. Joshua F. was defaulting on the note, and Harry F., who was an infant at the time the note was given, pleaded infancy. He signed the note at his father's request as surety, but never received any of the money, nor any benefit from it. At the time the note was given, Harry F. executed to the bank an assignment in writing, under seal, all of his right, title, and interest in the policy, as collateral security for the payment of the note, and at the same time Joshua F. by a like instrument, in which he recited among other things, that he had always considered the policy to

* Decision rendered, March 12, 1886.—From *Eastern Reporter*.

his property, subject to his control and disposal, having been so informed by the agent who took his application for the policy, and for the further reasons that the policy was taken without the knowledge of the son, that the premiums had been entirely paid by him, also assigned all his right and interest in the policy to the bank as collateral security for the note. The bank held the policy and the foregoing assignment at the time the policy fell due.

After the above assignments Joshua F. received notice of the several premiums mentioned in the specification at their respective dates, and requested the plaintiffs to pay them, and they were paid by the plaintiffs at his request, of which Harry F. had no knowledge. November 17, 1880, William T. Parker, the trustee in this suit, having been appointed guardian of Harry F., received the policy from the bank, giving an accountable receipt for the same; and November 20, 1880, Parker received from the insurance company \$3,726.04 in payment of the policy. At the request of the officers of the bank, Parker inquired of his ward if he would permit him to pay the plaintiff's claim from the money. He declined claiming the money as his. Harry F. became of age about eight months before this suit was brought, but he has never affirmed the assignment or promised to pay the plaintiff's demand since the note was given. Facts found by the court.

C. H. BURNS, *for Plaintiff.*

E. E. PARKER and A. F. STEVENS, *for Defendants.*

CLARK, J.

As H. F. Whittle signed the note as surety and received no benefit from it, his plea of infancy is a defense to the note. The beneficial interest in the life insurance policy procured for his benefit and made payable to him became vested in him when the policy was issued: *Kimball vs. Gilman*, 60 N. H., 54; *Stokel vs. Kimball*, 59 id., 13; *Bowers vs. Parker*, 58 id., 565; *May Ins.*, § 392. His father's assignment gave the bank no title to the proceeds of the policy. The minor's assignment, though voidable, was valid until it was disaffirmed by him. The bank was rightfully in possession of the policy, and the assignment was an implied request and authority to do what was necessary to keep it in force and protect the insurance.

The payment of the premiums by the bank, necessary to keep the policy on foot, was by the implied request and authority of H. F. Whittle and for his benefit, and may be treated as made in his

behalf; and by claiming and receiving the benefit of the payments he ratified them and became liable to the bank therefor: *Unity Association vs. Dugan*, 118 Mass., 219; *Hall vs. Butterfield*, 59 N. H., 354; *Bartlett vs. Bailey* id., 408.

The plaintiff can have judgment against both defendants for the amount of the premiums paid and costs; and the trustee is chargeable for that amount. The plaintiff can also have judgment against J. F. Whittle for the amount due on the note, without costs : *Cole vs. Gilford*, ante, 60; *Chauncey vs. Insurance Co.*, 60 N. H. 428.

Case discharged.

Allen, J., did not sit; the others concurred.

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REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF ILLINOIS.

Appeal from Appellate Court, First District.

CONTINENTAL LIFE INS. CO.)

vs.)

CAROLINE S. RODGERS.*)

Where no evidence has been offered to prove any material allegation in the declaration put in issue by the pleadings and not admitted for the purpose of the trial, or otherwise waived, the court should on motion exclude evidence offered on other issues and direct a finding for defendant.

The plaintiff by setting up the application makes the legal effect the same as if every fact therein stated had been expressly averred.

* Decision rendered, January 26, 1887.

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Where the application is a part of the policy and a warranty, its statements will be deemed material, and if false, even though harmless, or innocent so, no recovery can be had as a general rule, but in certain exceptional cases such statements may be merely representations.

Where the policy provides that the statements in the application are warranties, and immediately after that if the policy has been obtained through fraud, misrepresentation, or concealment it shall be void, the two must be construed together, and statements in the application not fraudulent representations, and any defense founded on fraud must be set up and proved.

Matters which appear only in the application, whether warranties or representations, can only be availed of as a defense by proving their falsity or breach. But the plaintiff must aver and prove, or offer to prove, performance of the agreement.

When the making of the policy, payment of premium, death notice and proofs have been averred and proved, a prima facie right of recovery is made out.

Where notice and proofs have been received and retained without objection until the trial, any defects in them are waived.

Refusal to pay on some ground not affecting the merits, as want of proper notice, is a waiver of all other objections.

MULKEY, J.

The appellee, Caroline S. Rodgers, recovered a judgment in the Superior Court of Cook County, against the Continental Life Insurance Co., for \$5,522 on a policy of insurance issued by the company to the plaintiff upon the life of her husband. Herbert S. Rodgers. The policy is in the usual form, and bears date May 23d, 1881. On the defendant's appeal, the judgment was affirmed by the appellate court for the first district, and the company thereupon appealed to this court. The declaration is in assumpsit, containing two counts. The first is a special count setting out the policy and application in *hæc verba*, followed by the usual averments in such cases. The second is a consolidated common count for money had and received for interest, and for money due on an account stated. The plea of non-assumpsit alone was filed to the whole declaration.

The plaintiff being sworn as a witness in her own behalf, testified that she was the wife of Herbert S. Rodgers at the time of making the policy; that he died on the 16th of December, 1883, at Minneapolis; that she found the policy, together with the company's receipts showing payment of the premiums, among his papers, which were produced in court, and put in evidence. The application being in possession of the defendant, was not offered in evidence by plaintiff, or, indeed by either party, nor had the defendant been served with any notice to produce it on the trial other than that which may be implied by law from the bringing of the suit, and setting it out in the declaration.

The policy offered in evidence contained the following provision :

Provided, always, and it is hereby declared to be the true intent and meaning of this policy, and the same is granted by the company and accepted by the assured upon the following express conditions and agreements: * *

Second. That the answers, statements, and declarations contained in or indorsed upon the application for this insurance, which application is hereby referred to and made part and parcel of this contract as if fully recited herein; and upon the faith of which this agreement is made, are warranted by the assured to be true in all respects; and that if this policy has been obtained by or through any fraud, misrepresentations, or concealment, said policy shall be absolutely null and void. * * *

Seventh. That no claim shall exist under this policy, unless due notice and satisfactory proof of death shall be presented in writing to the officers of said company at the home office in Hartford, Connecticut, within two years after the death of the person whose life is hereby insured.

In addition to this, the application which is signed by the company as well as the assured, contains the following provision:—

And it is hereby covenanted and agreed, that the statements and representations contained in this application and declaration, shall be the basis of and form part of the contract, or policy of insurance, between said party or parties signing this application and the said Continental Life Insurance Company, which statements and representations are hereby warranted to be true, and any policy which may be issued upon this application by the Continental Life Insurance Company, and accepted by the applicant, shall be so issued and accepted upon the express condition that if any statements or representations in this application are in any respect untrue, or if any violation of any covenant, condition, or restriction of the said policy shall occur on the part of the party or parties signing this application, then the said policy shall be null and void, and all money which shall have been paid on account of said policy shall be forfeited to the said company.

The plaintiff then, for the purpose of showing that notice had been given and proofs made of Rodgers' death, put Steward Marks, the general manager of the company for its northwestern department, upon the stand, who testified in substance, that certain blanks were sent to Mr. Williams, the company's agent at Minneapolis, for the purpose of making out such proofs; that they were subsequently handed to him by Mr. Smith, the plaintiff's attorney, to be forwarded to the company at its home office; that he could not answer whether he had sent them, because he was not able to find he had done so from an examination of his letter-book; that, ordinarily, as a matter of convenience to policy-holders, he sent such proofs to the home office; that Maj. Henry P. Barton, superintendent of the company's agencies, generally has charge of the settlement of policies when deaths occur, and was such superintendent in January, 1884; that

witness met Maj. Barton and plaintiff's attorney in Grannis Block, in reference to this claim, and several conversations were had about it. Mr. Smith, plaintiff's attorney, then testified as follows : " I delivered them (the proofs) to Mr. Stewart Marks under this policy. They were delivered to him by me on the first day of January, 884, to the best of my recollection. The day before this suit was commenced, I was notified by Mr. Marks that Major Barton was here, and would like to meet me at their office in reference to this matter. They declined to pay it. Didn't put it on any ground, but simply declined to pay it. Said he would give me the amount of money the man had paid them."

Upon this state of facts the court refused, upon the defendant's application, to either exclude the evidence from the jury or to instruct them to find for the defendant. The defendant declined to offer any evidence, and the cause was submitted upon the foregoing evidence with the result already stated.

It is earnestly contended by appellant's counsel, that the trial court erred in refusing to instruct the jury to find for the defendant or to exclude the evidence from the jury. This contention is based upon four distinct propositions, which if true to the extent claimed, clearly justify the conclusion which counsel draws from them. These propositions are as follows:—

1. That the plaintiff, by setting up the application makes it a part of the same, and that the legal effect of it is the same as if every fact therein stated had in the ordinary way been expressly averred. 2. That the matters and things set up in the application being declared both in the policy and application to be a part of the contract, and being also expressly warranted by the assured "to be true in all respects," are by the terms of the contract itself made "material," or in other words are made "warranties," without regard to whether they are in fact material to the risk or not. 3. That the answers, statements, and representations in the application being warranties, they are conditions precedent to a recovery, and the plaintiff was bound to prove them, regardless of their form, nature, or character, to justify a recovery. 4. It is the settled law and practice in this State that where no evidence has been offered to prove any material allegation in the declaration put in issue by the pleadings, and not admitted for the purpose of the trial, or otherwise waived or dispensed with, the court should, on motion, exclude the evidence offered on other issues in the case, or direct the jury to find for the defendant. The last proposition is fully sustained by the decision

of this court, and may be admitted to be true without qualification : *Frazer vs. Howe*, 106 Ill., 563; *Abend vs. Terre Haute etc. Ry. Co.*, 111 Ill., 202.

The first proposition is also equally true, and is so elementary in its character as to require no authority in its support.

With respect to the second proposition, it is believed it cannot be maintained as universally true without some qualification. It is, however, generally true, that where the application is expressly declared to be a part of the policy, and the statements therein contained are warranted to be true, as was the case here, such statements will be deemed material, whether they are so or not; and if shown to be false there can be no recovery on the policy, however innocently made, and notwithstanding their falsity may have no agency in causing the loss, or producing the death of the assured ; *Ripley vs. Aetna Ins. Co.*, 30 N. Y., 136; *O'Neil vs. Buffalo Fire Ins. Co.*, 3 N. Y., 142; *Bartean vs. Phoenix Mut. Life Ins. Co.*, 67 N. Y., 595. While this is true as a general rule, still there are cases to be found in which the statements in the application have been held to be representations merely, notwithstanding they were expressly declared to be warranties, as they are here.

Thus in *Fitch vs. American P. L. Ins. Co.* (59 N. Y., 557), which was an action on a life policy, and the defense an alleged breach of warranty by the assured in untruly answering certain questions in the application, the policy, among other statements contained the following : "Fraud or intentional misrepresentation violates the policy, and the statements and declarations made in the written application for this policy, and on the faith of which it was issued, are warranties in all respects true, and do not suppress or omit any fact relative to the insured affecting the interest of the company, or which, whether material or not, would tend to influence the company in taking the risk." In the concluding part of the application occurs the following : "I, the undersigned applicant, do hereby declare that the preceding answers to the annexed questions, and written statements in the preceding statement, declaration, or warranty, together with the statements made to the examining physician, are warranties, correct and true, * * * and shall be the basis and form part of the contract or policy between the undersigned applicant and the said company; and, if not in all respects true and correct, the policy shall be void." It is also further said in the policy that the same is issued and accepted "in entire, unconditional honesty and good faith, and with the just in-

tent of scrupulously fulfilling all the conditions and engagements of the contract with absolute certainty," etc. Under this state of facts, one of the questions made in the case was whether the statements in the application were warranties or merely representations, and it was held they were the latter. The conclusions reached seems to have been placed mainly on two grounds, namely: 1. Because the good faith and honest intentions of the contracting parties are so studiously and conspicuously kept in the foreground of the transaction. 2. It was thought that, because of the frivolous character of many of the questions and answers, and the difficulty, if not impossibility, of proving many of them after the death of the assured, it could not have been intended to give them the force and effect of absolute warranties. As to the first ground of the decision, it was certainly a work of supererogation, so far as the insured was concerned, to make any reference whatever to his good intentions, honest purposes, etc., if as was claimed his answers and statements were all warranties binding him absolutely, without regard to whether they were made honestly or dishonestly. Both of the elements forming the basis of the decision in that case are clearly present in this. Thus the statement in the policy that the answers, statements, etc., in the application, etc., "are warranted by the assured to be true in all respects" is followed by the additional statement, "That if this policy has been obtained by or through any fraud, misrepresentation, or concealment, said policy shall be absolutely null and void." It is clear the fraud, concealment, and misrepresentation here contemplated can have no application to anything other than the answers to the questions in the application. If true and full answers, there could be neither fraud, concealment, nor misrepresentation; and, if not full and true upon the hypothesis they were warranties, the insured would incur a forfeiture of the policy, whether there was any intentional misrepresentation or suppression of the truth or not. If the answers, however, are simply representations as contradistinguished from warranties, in the technical sense of those terms, then such of the answers not material to the risk, as were honestly made in the belief they were true, would not be binding upon the assured, or present any obstacle to a recovery. It is clear, therefore, the only way in which to give that provision of the policy relating to fraud, concealment, and misrepresentation any effect at all, is by treating the answers in the policy as mere representations, and not warranties. If so treated, any defense founded upon an alleged misrepresentation or fraudulent concealment, it is clear, would have to be set

up and proved by the company. And is this not more in consonance with the presumed intentions of the parties than the opposite view? Turning our eyes to the policy we find the insured is exhaustively examined with respect to his afflictions through life in the way of diseases. Each disease is specifically pointed out and called to his attention in a separate interrogatory. Question follows question until the number of diseases brought in review amounts altogether to twenty-four, which is followed by just the same number of categorical answers. Some of the diseases in this imposing list are of such a character that most persons afflicted with them would naturally shrink from giving publicity to the fact, and consequently no proof could be made after their death one way or the other. Again, he is asked the condition of his father's mother's health previous to her death, and he answers he does not know. Now, suppose this answer is to be regarded as a warranty, and that the plaintiff is bound to prove, as is claimed, the truth of it as a condition precedent to a recovery, is it not clear no recovery could be had at all, for from the very nature of the answer no proof could be made about it after his death? Moreover, this fact was just as well known to the parties at the time as it was after the assured's death. The question then arises, ought a construction to be accepted as the true one which will lead to such consequences when another reasonable construction can be adopted which will not lead to such results, and will, moreover, give effect to all the provisions of the policy, which the opposite construction clearly would not? We think not. But, leaving this all out of the question, whatever may be the holding of other courts on the subject, the rule seems to be well settled in this State that it is not necessary for the plaintiff in an action on a policy to either allege or prove such matters as appear in the application only. To be availed of as a defense without regard to whether they are warranties or representations merely, their falsity or breach by the assured must be set up and proved by the defendant as matter of defense: *Herron vs. Peoria M. & F. Ins. Co.*, 28 Ill., 235; *Illinois Fire Ins. Co. vs. Stanton*, 57 Ill., 354; *Mutual Benefit Life Ins. Co. vs. Robertson*, 59 Ill., 123; *Guardian Mutual Life Ins. Co. vs. Hogan*, 80 Ill., 35.

The same view is taken by the United States Supreme Court in *Piedmont Ins. Co. vs. Ewing* (92 U. S., 377). It is there said: The number of questions now asked of the assured in every application for a policy, and the variety of subjects and length of time which they cover are such that it may be safely said no sane man would

ever take a policy if proof, to the satisfaction of a jury, of the truth of every answer were made known to him to be an indisputable prerequisite to payment of the sum secured, that proof to be made only after he was dead, and could render no assistance in furnishing it. On the other hand, it is no hardship that, if the insurer knows or believes any of the statements to be false, he shall furnish the evidence on which that knowledge or belief rests. He can thus single out the answer whose truth he proposes to contest; and if he has any reasonable grounds to make such an issue, he can show the facts on which it is founded. The judge of the circuit court was therefore right in refusing to instruct the jury that the burden of proving the truth of these answers rested with the plaintiff below."

The view taken in that case has our hearty concurrence, and it is believed to be supported by the later and better authorities. It is certainly founded on convenience, and is promotive of justice. Nor does the rule and practice here sanctioned at all conflict with the general and well-recognized doctrine that the plaintiff must aver in his declaration, and prove on the trial, performance on his part of the agreement, or at least an offer to perform; otherwise, he will not be entitled to recover, unless he is prepared to show there has been a waiver of such performance by the defendant. Such promissory conditions in the contract as he has undertaken to perform are known to the law as conditions precedent; and if they have not been waived or dispensed with by the defendant, the plaintiff is bound at his peril to aver and prove them on the trial. This elementary rule of law applies as fully to actions on policies of insurance as to any other class of cases. So, in this case the plaintiff was bound to aver and show in her declaration the making of the policy, its terms, the payment of the premium, the death of the assured, and the giving of notice and making proof thereof to the company. When these averments had all been proved, in so far as their proof had not been waived or dispensed with, a prima facie right of recovery was made out against defendant, which the latter was bound to meet by some affirmative action; otherwise, the plaintiff was entitled to judgment.

It is contended, however, that, even upon this theory, the plaintiff was not entitled to recover, for the reason there was no competent testimony before the jury from which they were authorized to find that notice and proofs of the death of the assured were made out and given to the company within the time and in the manner required by the policy. This is conceded. Nevertheless, we do not

the defendant is in a position to take advantage of the deficiency of the proofs in this respect. It is an elementary principle of law that it is not necessary in any case to prove the performance of a condition which has been waived by the party having the right to demand its performance. A condition once waived is forever gone, and the performance of it cannot be thereafter required. It is well settled that where notice and proofs of death of the assured in the case of a life policy, have been made out and delivered to the company in due time, and they have been retained by it without objection, the company cannot, when subsequently sued on the policy, question their sufficiency: *Peoria M. & F. Ins. Co. vs. Lewis*, 18 Ill., 553; *Hartford Fire Ins. Co. vs. Peoria M. & F. Ins. Co.*, 54 Ill., 164; *Great Western Ins. Co. vs. Staaden*, 26 Ill., 360; *Peoria M. & F. Ins. Co. vs. Staaden*, 28 Ill., 235.⁴

Moreover, it is well settled that where an insurance company, after a death has occurred, places its refusal to pay upon some ground not touching the merits of the case, as for instance, want of proper notice, or other formal objections not then complained of or pointed out, such refusal may be regarded as waived. On the same principle, when the policy is that the policy, for any cause, never became legally binding upon the company, and it places its refusal to pay on that ground, it cannot be heard afterwards to urge any mere formal objection to the right of recovery.

We think the facts in this case warranted the jury in finding proofs of notice of the assured's death were delivered to the company in due time. The proofs were made out, and handed to the company's agent at Chicago, to be sent by him to the home office at Hartford, Connecticut, on the 31st day of January, 1884. The agent swears it was his custom, as a matter of convenience to the patrons of his company, to deliver proofs in that way; and it is but reasonable to presume he performed his duty in that respect, although he says he did not always do so, and could not say whether he did it in that case or not. At all times in May following the general adjuster of losses was in Chicago, and at his request, Mr. Smith, the attorney of the plaintiff called on him in connection with this claim and several interviews were had between them about it, resulting in an offer on the part of the company to return amount of premiums paid by the assured, but a refusal to pay anything on the policy. It is evident from these circumstances that the claim of the plaintiff had been referred by the company to its general adjuster of such claims, and this probably would not have been done if proofs of no kind of the assured's

death had been received at the home office. Neither in these interviews nor at any other time does it appear any formal objections were interposed to the payment of the claim. The conduct of the company in offering to return the premiums, and making no formal objections to the proofs, or otherwise, we regard as equivalent to denying all liability on the policy. We also think the placing of its refusal on that ground was a waiver of all merely formal defenses, and consequently relieved the plaintiff from proving anything for the purpose; meeting merely formal objections such as the making out and the delivering of the proper proofs.

But this is not all. Assuming as we do, there was sufficient evidence before the jury from which to find that some kind of proofs of the death of the assured were in apt time delivered to the company, their failure to make any objection to them estopped them from afterwards questioning their sufficiency. Consequently the offering of them in evidence would have been a mere idle ceremony; for, however defective they have been, no advantage would have been taken of it. In addition to all this we think, with the appellate court, that the filing of the declaration in this case of itself implied notice to the defendant to produce the proofs in question on the trial, and not having done so, the verbal testimony offered on the subject was, in our opinion, sufficient to warrant the finding of the jury: *Nealy vs. Greenough*, 25 N. H., 325; and cases cited; 2 Phil. Cow. and H. Notes, 5 Ed., Marg. P. 538, Note, 461.

It is hardly necessary to say, in conclusion, that the evidence before us has been discussed exclusively in its relation to the motion to withdraw the case from the jury, or to instruct the jury to find for the defendant, and not at all with a view of determining whether the facts were properly found by the jury, or by the appellate court.

Judgment affirmed.

SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1886-87.

Appeal from Mobile Circuit Court.

ALABAMA GOLD LIFE INS. CO.

vs.

WILLIAM F. JOHNSTON, ADM'R, ETC.*

In a contract of insurance, a warranty is part and parcel of the contract itself, is in the nature of a condition precedent, and, whether material to the risk or not, must be strictly complied with, or literally fulfilled, before the assured can recover on the policy, while a representation not being of the essence of the contract, but relating to something collateral, or preliminary, and in the nature of an inducement to it, does not, though false, avoid the policy, unless it relates to a fact actually material, or clearly intended to be made material by the agreement of the parties.

The mere fact that a statement is referred to, or even inserted in the policy itself, is not now considered conclusive of its nature as a warranty; but whether it is to be construed as a warranty or as a representation merely, depends rather on the form of the expression, the apparent purpose of the insertion, and its connection with other parts of the application and policy, construed together as an entire contract.

Among the settled rules for the construction of policies of insurance are these: 1st, that all the conditions and obligations of the contract will be construed liberally in favor of the assured, and strictly against the insurer; 2d, that the clearest and most unequivocal language is necessary to create a warranty, and all statements of doubtful meaning will be construed as representations merely; 3d, that even though a warranty in name or form be declared by the terms of the contract, its effect may be modified by other parts of the policy, or of the application, including the questions and answers, so that answers to questions not material to the risk will be construed as warranting only their honesty and good faith.

In this case the contract containing inconsistent expressions—one part tending to show an intention to make the answers warranties, and another treating them as representations—the court holds, 1st, that the answers are not absolute warranties, but in the nature of representations, or, if warranties, only of an honest belief of their truth; 2d, that any untrue

* Decision rendered, May, 1887.

statement or suppression of fact material to the risk will vitiate the policy, and thus bar a recovery, whether intentional or within the knowledge of the party or not; 3d, that such statement of a material fact, though untrue, will not avoid the policy, unless the party knew it was false or was negligently ignorant of it; and, 4th, that the inquiries as to the symptoms of disease were not intended to be absolutely material, unless they had existed in such appreciable form as would affect soundness of health, or have a tendency to shorten life.

The complaint in this case was sued out October 30, 1887, in the name of William F. Johnston, administrator of Dora E. Connor, deceased, the wife, and guardian of William T. Connor and Walter M. Connor, the children of William David Connor, the deceased assured, and claimed damages under an insurance policy issued on the life of said decedent. The defendant filed several pleas, setting forth that the following questions and answers were contained in said application for insurance, to wit: "Has the party had or been affected since childhood with fits or convulsions?" "No." "Has the party ever been seriously ill? If so, when, of what complaint, and who was the medical attendant?" "No." "Has the party ever had or been afflicted since childhood with any serious disease?" "No." And the defendant averred in their said pleas that the said questions were material to the issue of said policy; that they were untrue, in that the assured had been afflicted with fits and convulsions, and that it had been expressly stipulated that if any of said statements were untrue the said policy should be void. The defendant's fifth plea was substantially that the said W. D. Connor did declare and state in said proposal for insurance he had not withheld any material circumstance or information touching the past or present state of health or habits of life of said W. D. Connor; and that this written application was the basis of the contract between him and the beneficiaries in said policy and said company, and that if any fraudulent or untrue allegations be contained therein, or in the proposal, all moneys which shall be paid on account of said insurance shall be forfeited to the company, and the policy shall be void. Said policy sued on also expressly stipulates and provides that if said declarations, or any part thereof, made by or for said insured, in the application for this policy, and upon the faith of which this policy is made, shall be found in any respect untrue, then in such case the policy shall be null and void. Said defendant further says that said declarations and statement in said written application were untrue in this; that the said W. D. Connor did withhold from the officers and directors of defendant a material circumstance and information touching the past state of health of said W. D. Connor in this,

that when he was of the age of seventeen or eighteen years, he was afflicted with fits or convulsions, which fact he withheld from the officers and directors of said defendant when he made said application for insurance, and which was material information, and which withholding by the terms of said application and policy, rendered said policy null and void. Upon the trial of the cause a verdict was rendered for the plaintiff for \$5,800, from which this appeal is taken.

The said policy of insurance in part was : "This policy of insurance witnesseth, that the Alabama Gold Life Insurance Company, in consideration of the representations made to them in the application for this policy of insurance, and of the annual premium, * * * do assure the life of William David Connor * * * for the sole use and benefit of Dora Connor, wife of the insured, and his children, in the amount of five thousand dollars. * * * And it is also understood and agreed by the within assured, to be the true intent and meaning hereof, that if the declaration, or any part thereof, made by or for the said insured in the application for this policy, * * * and upon the faith of which this policy is made, shall be found in any respect untrue, then, and in such case, this policy shall be null and void."

The heading of said application was, "Particulars required from persons proposing to effect insurance on lives in this company, and forming the basis of the contract. The questions and answers set forth above, with others, are contained in said application, and the same concludes : "We do hereby declare that in the above proposal we have not withheld any material circumstance or information touching the past or present state of health or habits of life of W. D. Connor. * * * And we hereby agree that the declarations and the above proposal shall be the basis of the contract between us and the said company; and if any fraudulent or untrue allegation be contained therein, or in the proposal, all moneys which shall have been paid on account of such insurance shall be forfeited to said company, and the policy void."

The evidence tended to prove the material allegations of the complaint and of the pleas, and that the said W. D. Connor when he was seventeen or eighteen years of age was afflicted with fits or convulsions, but that they lasted but a short while, and passed entirely away, and had not produced his death.

The defendant then asked the court to charge the jury that if they believed the evidence they must find for the defendant; but the court refused to give said charge, and the defendant excepted.

OVERALL & BENTON, *for Appellants.*

WM. T. JOHNSON, J. L. & J. T. SMITH, *Contra.*

SOMERVILLE, J.

The question of most importance which is raised by the rulings of the court in this case, is, whether the answers made by the assured to the questions contained in the application for insurance are to be construed as absolute warranties, or in the nature of mere representations.

The distinction between a warranty and a representation in insurance is frequently a question of difficulty, especially in the light of more recent decisions, which recognize the subject as one of growing importance in its relations, particularly to life insurance. As a general rule it has been laid down that a warranty must be a part and parcel of the contract of insurance, so as to appear, as it were, upon the face of the policy itself, and is in the nature of a condition precedent. It may be affirmative of some fact, or only promissory. It must be strictly complied with, or literally fulfilled, before the assured is entitled to recover on the policy. It need not be material to the risk, for whether material or not, its falsity or untruth will bar the assured of any recovery on the contract, because the warranty itself is an implied stipulation that the thing warranted is material. It further differs from a representation in creating on the part of the assured an absolute liability whether made in good faith or not.

A representation is not, strictly speaking, a part of the contract of insurance, or of the essence of it, but rather something collateral or preliminary, and in the nature of an inducement to it. A false representation, unlike a false warranty, will not operate to vitiate the contract or avoid the policy, unless it relates to a fact actually material, or clearly intended to be made material by the agreement of the parties. It is sufficient if representations be substantially true. They need not be strictly or literally so. A misrepresentation renders the policy void on the ground of fraud; while a non-compliance with a warranty operates as an express breach of the contract.

The mere fact that a statement is referred to, or even inserted in the policy itself, so as to appear on its face, is not alone now considered as conclusive of its nature as a warranty, although it was formerly considered otherwise. Whether such statement shall be construed as a warranty or a representation depends rather upon the form of expression used, the apparent purpose of the insertion,

and its connection or relation to other parts of the application and policy, construed together as a whole, where legally these papers constitute one entire contract, as they most frequently do: Bliss on Insurance, § 43, et seq.; Price vs. Phoenix Mut. Ins. Co., 17 Minn., 497, s. c., 10 Amer. Rep., 166, 172.

In construing contracts of insurance there are some settled rules of construction bearing on this subject which we may briefly formulate as follows:—

(1.) The courts being strongly inclined against forfeitures, will construe all the conditions of the contract, and the obligations imposed, liberally in favor of the assured, and strictly against the insurer.

(2.) It requires the clearest and most unequivocal language to create a warranty, and every statement or engagement of the assured will be construed to be a representation and not a warranty, if it be at all doubtful in meaning, or the contract contains contradictory provisions relating to the subject, or be otherwise reasonably susceptible of such construction. The court, in other words, will lean against that construction of the contract which will impose upon the assured the burdens of a warranty, and will neither create nor extend a warranty by construction.

(3.) Even though a warranty in name or form be created by the terms of the contract, its effect may be modified by other parts of the policy, or of the application, including the questions and answers so that the answers of the assured, so often merely categorical, will be construed not to be a warranty of immaterial facts stated in such answers, but rather a warranty of the assured's honest belief in their truth—or, in other words, that they were stated in good faith. The strong inclination of the courts is thus to make these statements or answers, binding only so far as they are material to the risk, where this can be done without doing violence to the clear intention of the parties expressed in unequivocal and unqualified language to the contrary.

In support of these deductions we need not do more than refer to the following authorities: Moulor vs. American Life Ins. Co., 111 U. S., 335; National Bank vs. Insurance Co., 95 U. S., 678; Price vs. Phoenix Mut. Life Ins. Co., 10 Amer. Rep., 166, *supra*; Southern Life Ins. Co. vs. Booker, 9 Heisk., 606, s. c., 24 Amer. Rep., 344; Fitch vs. American etc. Ins. Co., 59 N. Y., 557, s. c., 17 Amer. Rep., 372; Bliss on Ins., § 34; Campbell vs. New England Mut. Life Ins. Co., 98 Mass., 381; Fowler vs. Aetna Fire Ins. Co., 16 Amer.

Dec. note, p. 463-6; *Piedmont etc. Ins. Co. vs. Young*, 58 Ala., 476; 2 *Parsons on Contr.*, *465, et seq.; *Glendale Woolen Co. vs. Protection Ins. Co.*, 54 Amer. Dec., 309, 320; *Wilkinson vs. Connecticut Mut. Life Ins. Co.*, 30 Iowa, 119, s. c., 6 Amer. Rep., 657; 1 *Phillips on Ins.*, § 638; *Angell on Fire and Life Ins.*, §§ 147, 147a.

Many early adjudications may be found, and not a few recent ones also, in which contracts of insurance, and especially of life insurance, have been construed in such a manner as to operate with great harshness and injustice to policy-holders, who, acting with all proper prudence, as remarked by Lord St. Leonards, in the case of *Anderson vs. Fitzgerald* (4 H. L. C., 507, s. c., 24 L. & Eq., 1), had been "led to suppose that they had made a provision for their families by an insurance on their lives, when, in point of fact, the policy was not worth the paper on which it is written." The rapid growth of the business of life insurance in the past quarter of a century, with the tendency of insurers to exact increasingly rigid and technical conditions, and the evils resulting from an abuse of the whole system, justify, if they do not necessitate, a departure from the rigidity of our earliest jurisprudence on this subject of warranties. And such, as we have said, is the tendency of the more modern authorities.

There are, it is true, in this case some expressions in both the policy and the application (which, taken together, constitute the contract of insurance), that indicate an intention to make all statements by the assured absolute warranties. The application, consisting of a "proposal" and a "declaration," is declared to "form the basis of the contract" of insurance, and the policy is asserted to have been issued "on the faith" of the application. It is further provided that if the declaration, or any part of it, made by the assured shall be found "in any respect untrue," or "any untrue or fraudulent answers" are made to the questions propounded, or facts suppressed, the policy shall be vitiated, and all payments of premiums made thereon shall be forfeited. So, if there were nothing in the contract to rebut the implication, it might be held that the parties had made each answer of the assured material to the risk by the mere fact of propounding the questions to which such answers were made, and that this precluded all inquiry into the question of materiality: *Price vs. Phoenix Mut. Life Ins. Co.*, 10 Amer. Rep., 166, *supra*.

On the contrary, the policy purports to be issued "in consideration of the representations" made in the application, and of the an-

nual premiums. The answers are nowhere expressly declared to be warranties, nor is the application, in so many words, made a part of the contract so as to clearly import the answers into the terms and conditions of the policy. Among numerous other questions, the assured was asked whether he had been affected since childhood with any one of an enumerated list of complaints or diseases, including "fits or convulsions;" and whether he had "ever been seriously ill," or had been affected with "any serious disease." To each of these questions he answered "No." The concluding question is as follows: "32. Is the party aware that any untrue or fraudulent answers to the above queries, or any suppression of the facts in regard to the party's health, will vitiate the policy and forfeit all payments made thereon?" To this was given the answer, "Yes." It is significant, as observed in a recent case before the New York Court of Appeals, that the assured "is not asked whether he is aware that any unintentional mistake in answering any of the host of questions thrust at him, whether material to the risk or not, will be a breach of warranty, and vitiate his policy:" *Fitch vs. American etc. Ins. Co.*, 59 N. Y., 557, s. c., 17 Amer. Rep., 372, supra. Then follows a declaration that "the assured is now in good health, and does ordinarily enjoy good health," and that in the proposal of insurance he "had not withheld any material circumstance or information touching the past or present state of health or habits of life" of the assured, with which the company "should be made acquainted"

One part of the contract thus tends to show an intention to constitute the answers warranties, while the other describes and treats them as representations. There is thus left ample room for construction. What is to be understood by "untrue" answers, or "any suppression of facts?" Can they have reference to any disease with which the assured was alleged to have been afflicted, of which he knew nothing, and could not possibly have informed himself by the exercise of proper diligence? Are they intended as absolute warranties of the fact that he had never, since childhood, or during life, been afflicted with diseases of which neither he, nor the most skillful physician could have had any knowledge whatever? The case of *Moulor vs. American Life Ins. Co.* (111 U. S., 335) is a direct and strong authority for the position that the word "untrue" in the above connection, in its broader sense, means knowingly or designedly untrue, or else recklessly so—that it is the opposite of sincere, honest, not fraudulent. As said in that case, it is reasonably clear that "what the company required of the applicant, as a condition

precedent to any binding contract, was that he would observe the utmost good faith towards it, and make full, direct, and honest answers to all questions without evasion or fraud, and without suppression, misrepresentation, or concealment of facts, with which the company ought to be made acquainted; and that by doing so, and only by doing so, would he be deemed to have made fair and true answers."

The case of *Southern Life Ins. Co. vs. Booker* (9 Heisk., 606, 24 Amer. Rep., 344) sustains the same view. There the policy, here, was conditioned to be avoided by "any untrue or fraudulent answer" to the question in the application. The answers were not strictly true as to the birthplace, residence, and occupation of the assured. It was held that none of these being material to the risk they would be construed as representations, although expressly declared to be "the basis of the contract" of insurance. The court said: "It would seem to be gross injustice to allow this (meaning the avoidance of the policy and the forfeiture of all payments made under it), in a case where the insured has acted in the utmost good faith, and honestly disclosed every fact material to be known, because merely by inadvertence or oversight, an error of fact has been inserted in his application—an error that is clearly immaterial, and that could not by possibility have affected the contract. It is true that the parties have a right," the court adds, "to make their own contract, and by its terms we must be governed; but before a court could hold a policy void, and all premiums paid thereon forfeited because statements of this character in the application turned out to be untrue, they should be fully satisfied that such terms were fully and distinctly agreed to by the parties." These views, in our judgment, announce the sounder and more just doctrine, and they meet with our approval, being supported by reason, as well as by the more recent decisions in this country on the subject of life insurance: 3 Addison Contr. (Morgan's ed.), § 1,223; *Price vs. Phoenix etc. Ins. Co.*, 10 Amer. Rep., 166, 174, supra; *Fitch vs. American etc. Ins. Co.*, 17 Amer. Rep., 372, supra.

So the declaration embodied in the application would seem to indicate that it is the inadvertent suppression of statement only of material circumstances or information, with which the company should in good faith be made acquainted, that will vitiate the policy and cause a forfeiture. It cannot be supposed that one who, for the purpose of procuring insurance, alleges himself to be in good health shall be understood as warranting himself to be in perfect and absolute

health, for this is seldom, if ever, the fortune of any human being, and "we are all born," as said by Lord Mansfield in *Willis vs. Park. Ins.*, 555, "with the seeds of mortality in us." These are, as symptoms of diseases, as said by Mr. Parsons, there must mean whether they "have ever appeared in such a way, under such circumstances as to indicate a disease which would have a tendency to shorten life," and he adds, "it is with this meaning the question is left to the jury:" 2 Parsons' Contr., *468, 471; 3 Parsons Contr. (Morgan's ed.), § 1,223. It has accordingly been held in an English case, cited and approved both by Mr. Parsons and Mr. Addison, that even a warranty that the party whose life is insured, "has not been afflicted with, nor is subject to vertigo, fits, &c." would not be falsified by having had one fit. To forfeit the policy on this ground he must have been habitually or constitutionally afflicted with fits. Even then, adds Mr. Parsons, "we apprehend the materiality of the fact would be taken into consideration; that is, for example, the policy would not be defeated by proof that the life insured, long years before, and when a teething child, had a fit:" 2 Parsons' Contr., *471-472; *Ins. Co. vs. Wilkinson*, 13 Wall., 222.

There is nothing decided in *Alabama Gold Life Ins. Co. vs. Garfield*, 77 Ala., 210) or in *Alabama Gold Life Ins. Co. vs. Thomas* (74 Ala., 578), which conflicts with the foregoing views. The cases of *Willis vs. Life Ins. Co.* (22 Wall., 47), and *Ætna Life Ins. Co. vs. Moulton* (91 U. S., 510), are distinguished, if not modified, in the case of *Mouler vs. Amer. Life Ins. Co.*, 111 U. S., 341, 342.

Our conclusion is that the following is a just and fair construction of the contract of insurance under consideration :—

- 1) That the answers of the assured were not absolute warranties in the nature of representations; or if warranties, they are so qualified by other parts of the contract as to be warranties only of honest belief of their truth.
- 2) That any untrue statement or suppression of fact material to the risk assured will vitiate the policy, and thus bar a recovery, whether intentional or within the knowledge of the assured or not.
- 3) If immaterial, such statement, to avoid the policy, must have been untrue within the knowledge of the assured—that is, he must have known it, or have been negligently ignorant of it.
- 4) The terms of the contract rebut the implication that all symptoms of diseases inquired about were intended to be made absolutely true, unless they had once existed in such appreciable form as

would affect soundness of health, or have a tendency to shorten life, and thus affect the risk.

It is very obvious that the rulings of the circuit court conformed to these principles, and, for this reason, we are of opinion that they are free from error. The evidence was sufficiently conflicting in its tendencies to justify the refusal to give the general charge requested by the defendant. The judgment is therefore affirmed.

SUPREME COURT OF ILLINOIS.

Petition for Mandamus.

MUTUAL FIRE INS. CO. OF NEW YORK,

vs.

SWIGERT, AUDITOR, ETC.*

A company was organized under the laws of another State as a stock company, but by a subsequent amendment was authorized to receive subscriptions, payable in cash, and to give therefor interest-bearing receipts setting forth that they are given for premiums in advance, and are liable for losses and expenses, which receipts were to be receivable only in payment of premiums, and the company was authorized to commence business when the cash subscriptions had reached a certain sum.

Held, That it could not be considered a mutual company within the meaning of the Illinois law, where the subscribers are not required to insure at any time and thus cancel the receipts, and is not entitled to a license to do business as such in that State.

SHOFF, J.

This is an original proceeding in this court to compel, by mandamus, the auditor of public accounts to issue a license to relator for the transaction of the business of fire insurance in this State. The relator, the Mutual Fire Insurance Company of New York, shows by its petition filed herein, that it is a corporation organized under the laws of the State of New York, and makes exhibit of its charter and by-laws; that it made formal application to the auditor of this State for license to do business in this State, and offered to accept such license therefor in accordance with the laws of this State; that with its application it presented to the auditor a statement of its affairs and condition for six months next preceding such application,

* Decision rendered, March 25, 1887.

and a copy of an examination of its condition by the insurance department of the State of Minnesota, and evidence of the appointment of an attorney in this State upon whom service of process might be had; and averring that it had complied with all the requirements of section 1 of the act of the General Assembly of this State of June 4, 1879, and with all other requirements of the laws of this State relating to the admission of relator as a foreign insurance company, to do business in this State; and that it thereupon became the duty of the auditor to issue to it a license for that purpose by law, but that he refused so to do, etc. To this petition the respondent, by the attorney-general, interposed a general and special demurrer.

The laws of this State authorize the formation and organization of insurance companies in this State for various purposes, among which purposes is that of insuring against loss by fire. An examination of the various insurance acts upon the statute-books of this State, whether spoken of as fire, township fire, as life, or life indemnity, or accident, or permanent disability upon the assessment plan, shows that all these different purposes are to be attained under three forms or kinds of organization, viz.: stock companies, mutual companies, and companies formed on the assessment plan. When, therefore, the citizens of this State desire to enter upon the business of insurance, and to avail themselves of the benefits of corporate organization under the laws of this State, they can do so only in the form and subject to the restrictions and regulations prescribed by law, and the only kinds of companies known to our laws are the three just mentioned.

By the act of May 31, 1879 (Starr & C., 1,330), it is declared "that every insurance company or association incorporated by or organized under the laws of any other State * * * must comply with the requirements of the general insurance laws of this State, governing fire, marine, and inland navigation insurance companies doing business in the State of Illinois, before it shall be lawful for such company or association to take risks, or transact any kind of insurance business in this State." By the act of June 4, 1879 (Starr & C., 1,331), it is declared unlawful for any insurance company, organized under the laws of another State for the purpose of insuring against loss or damage by fire, to take risks or transact any business whatever authorized by its charter within this State, until it shall have made application to the auditor for a license, declaring in such application that it desires to transact the business of insurance in his State; that it will accept a license therefor according to the laws

of this State, which shall be revoked on its removing, or making application to remove a cause arising out of the business it may transact in this State from a State to a United States court, and, on its complying with these requirements, "together with all other requirements now imposed by existing law," the auditor shall issue a license, etc., but no such license shall be issued until all of said requirements shall have been complied with, nor shall any such company "carry on the business for which it may have been incorporated within this State, until it shall have obtained such license."

The general insurance law of March 11, 1869 (with its amendments), "to incorporate and govern fire * * * insurance companies doing business in this State of Illinois" (Starr & C., p. 1,310 et seq., sec. 22), declares it unlawful for any insurance company, "organized under the laws of any other State of the United States, * * * for any of the purposes specified in this act, directly or indirectly, to take risks or transact any business of insurance in this State, unless possessed of the amount of actual capital required of similar companies formed under the provisions of this act;" * * * and shall appoint a resident attorney on whom service of process may be made; file with the auditor a certified copy of its charter, and a verified statement of its chief officer, showing its name, its place of business, amount of capital stock, and a detailed statement of its assets and liabilities of every kind. The sixth section of said act prohibits the formation of any "joint-stock company" in Chicago, or with an established agency in that city for the purpose of insurance," with a smaller capital than \$150,000, actually paid in in cash," nor in any other county in the State with a smaller capital than \$100,000, actually paid in in cash; and no fire insurance company organized on the mutual plan can be incorporated and do business in Chicago, or with an established agency in that city, "until agreements for insurance have been entered into with at least 400 applicants, the premiums on which shall amount to not less than \$200,000, of which \$40,000 at least shall have been paid in in cash, and notes of solvent parties founded on actual and bona fide applications for insurance shall have been received for the remainder;" nor in any other part of the State "until agreements have been entered into for insurance with at least 100 applicants, the premium on which shall amount to not less than \$50,000, of which \$10,000 at least shall have been paid in in cash, and notes of solvent parties, founded on actual and bona fide applications for insurance, shall have been received for the remainder." None of the notes referred to shall exceed \$11,000, and

two notes shall not be given for the same risk, or made by the same person or firm, unless the whole amount is less than \$1,000;" "nor shall any such note be represented as capital stock unless a policy be issued upon the same, etc." "Each of the notes are required to be made payable, in whole or in part, at any time when the directors shall deem the same requisite for the payment of losses by fire, * * * and such incidental expenses as may be necessary." The act requires a certificate of a local justice of the solvency of the maker of the notes, and prohibits surrender of any note "during the life of the policy for which it is given." Sec. 14 of the act provides that notes taken by a mutual company at the time of its organization "shall remain as security for all losses and claims until the accumulation of premium notes and assets invested, etc., shall equal the amount of cash capital required to be possessed by stock companies organized under this act. * * * Every person effecting insurance in any mutual company is made a member of the corporation during the period of insurance, "and shall be bound to pay for losses and such necessary expenses * * * accruing in and to said company, in proportion to the amount of his deposit note or notes."

It will be seen that, in respect of fire insurance companies, provision is made for the organization of only two kinds, viz.: joint-stock companies and companies organized on the mutual plan. If the relator is either a joint-stock company, or organized as a mutual company, and in either case is possessed of the capital required by the laws of this State to be possessed by like companies organized thereunder, and has in other respects complied with the prerequisites provided in the statute, the license should have been granted, otherwise the auditor properly refused to grant the same. It is shown by the petition and exhibits made part thereof, that the relator was first organized in 1869, under the general insurance law of New York, chap. 466, laws 1853, as a joint-stock company under the name of "The Insurer's Own Insurance Company." The second section of its charter provided that its capital stock should be \$200,000, divided into shares of \$25 each, and the whole capital should be employed in its business. April 13, 1870, a special act was passed by the legislature of New York, changing the name of the company to the Mutual Fire Insurance Company, and amending the second section of its charter so as to read as follows:—

Sec. 2. In lieu of the notes, and of the agreements for insurance with four hundred applicants as provided in chapter 466, sec. 6 of

laws of 1853, the said company is authorized to receive from any number of persons subscriptions payable in cash, and give therefor receipts bearing interest, which receipts shall severally set forth that they are given for money received in advance for premiums of insurance, and that the amounts of the same, and every part thereof, are liable for the expenses and losses of said company; and the said receipts shall be received by said company only in payment for premiums of insurance or on account thereof; and the company may commence business on the mutual plan as soon as the whole amount so subscribed and paid in cash shall reach the sum of \$200,000, etc."

Thereby doing away with the provisions requiring capital stock, and authorizing the company to do "business on the mutual plan as soon as the whole amount so subscribed and paid in cash shall reach the sum of two hundred thousand dollars."

By the sixth section of its charter the board of trustees of the company are authorized "to divide among the insured the whole or any part of the profits of the business, such dividends to be made in scrip, which scrip may be issued in such form and for such amounts, and bear such rate of interest and be redeemable and transferable, and be subject to be reduced to pay losses and expenses, in such manner as may be determined by the by-laws of the company; but none of said scrip to be redeemable until it exceed \$200,000, and then to the extent of the excess only.

Sec. 7 provides that the profits of the company shall be determined as follows: "All moneys received for interest and premiums earned during the year shall be considered gross receipts. After deducting general expenses, taxes, losses, interest paid and payable, and all other contingent expenses, charges, and liabilities, the balance shall be considered the profits of the business." By article 12 of the by-laws of the company the profits that may be declared by the trustees are to be divided in scrip of the company and which is to bear interest not exceeding 6 per centum per annum. Again, in 1878, by another special act of the legislature of New York, the company was authorized to unite with its mutual plan a cash capital of \$80,000, to be divided into shares of \$50 each; the shareholders to be entitled to interest on their shares without incurring any liability as shareholders for the liabilities of the company, but with a right in certain cases to participate in the profits of the company, not in excess, however, of one-fourth thereof.

This stock capital, if paid in, would not, as we have seen, be sufficient in amount to authorize relator to do business in this State as

a stock company, and it appears by the statement of the company, filed with the auditor, that it has no "joint-stock" capital. It appears that the company has never availed itself of the provisions of this amendment to its charter. By the statement of the company exhibited, it also appeared that its "whole amount of contribution forming capital actually paid up in cash, is \$338,248.22." It is also shown by the certificate of the superintendent of the insurance department of New York that relator company is authorized (in that State) to issue policies and transact business as a mutual fire insurance company with a premium capital of \$200,000 contributed."

Originally, the relator company was organized as a joint-stock company, with sufficient authorized capital to have enabled it to do business in this State. It is manifest, however, that the special act of April 13, 1870, amending the second section of its charter, essentially changed its character, and it is now recognized by the insurance authorities of its own State not as a stock company, but as a mutual company. This amendment did more than to take away from the corporation its character of a joint-stock company, and thereby bring the corporation within the operation of the general insurance laws of New York in respect of mutual insurance companies. Had that been the only effect, it is obvious from the language of the amendment itself, that, before the corporation could have engaged in business it must have secured "notes and the agreement for insurance of four hundred applicants," substantially as required in that respect of companies organized in this State on the mutual plan. But by this amendment it is provided that, in "lieu" of such notes and applications for insurance, the corporation might incur an interest-bearing indebtedness of \$200,000, and call that its paid-in capital. It cannot change the essential character of this power of the corporation that the receipts or obligations of the company given for this borrowed capital, stipulate that it is "for money received in advance for premiums of insurance;" for it is nowhere provided, either in the charter or by-laws that the persons thus subscribing or loaning money to the company ostensibly for insurance, should take policies of insurance the premiums on which should amount to such advance or contribution at the time of making the same, or at any time, and thus furnish the means of taking up and getting out of the way this \$200,000 of interest-bearing obligations of the company. Indeed, so far as we can see, there is no provision for removing this burden from the company, and the policy of the company would indicate that it was intended to be permanent; for it appeared that

the interest-bearing contribution to relator's so-called capital has been extended to \$338,248.22, generally in excess of the amount stipulated as necessary by its charter as amended; and within the six months next preceding the application to the auditor, it is shown by the verified exhibit of the conditions of the company, that carried into the "income" account is an item of "contributions, forming additional capital for which the company's certificates have been issued for premiums on policies not yet issued, \$86,079.70." There seems to be no limit to the expansion of the "contributed capital" of the company, nor is it stipulated in the by-laws or charter of the company what rate of interest shall be paid on such contributions. As we understand, the interest on scrip given for dividends of profits is limited by the by-laws to not exceed 6 per cent per annum; but no such limitation is fixed upon contributions to capital. It seems, also, that the company treats this indebtedness of the company as stock, for it is shown by said exhibit that the "total amount of the company's stock owned by the directors, at par value (is), \$67,902.50." The directors are holders to that amount of the interest-bearing receipts for premiums on policies of insurance "not yet issued," as may be fairly inferred. If it should be contended that this interest-bearing "capital" can be paid off by the accumulations of profit scrip, it cannot, as we have seen, be reduced below \$200,000. Thus it will be seen that, as a mutual company, the relator must remain burdened with the payment of interest upon this large sum of money, and which may be increased practically without limit.

The persons making these contributions of advances are not required to be or to become members of the corporation, bearing its burdens in common with its policy-holders. Before the policy-holders can participate in the earnings of the company, the contributors must receive their interest, which as we have seen, is to be paid before the profits are ascertained or declared, and which are a fixed charge on the revenues of the company. The policy-holder, in addition to the cost of carrying his risk upon the ordinary mutual plan as contemplated in the organization of mutual insurance companies in this State, must pay such interest. The conclusion seems irresistible that, whatever else this corporation may be, it cannot be said to be a corporation for insurance organized and doing business on the mutual plan, as known and contemplated by the laws of this State, or having any resemblance thereto.

By the laws of this State there is, in any event, contemplated the

union of at least one hundred policy-holders, and if the company is organized in, or has an established agency in Chicago, not less than four hundred policy-holders in each mutual insurance company organized thereunder. The premiums, as we have seen in the former case upon actual and bona fide applications for insurance in the company, must amount to \$50,000, and in the latter to \$200,000, 20 per cent of which must be paid in in cash, and the residue, in either case, represented by notes of solvent parties who are actual and bona fide applicants for insurance to an amount equaling the premiums represented by the cash paid in and notes given to the company. The fund thus formed represents the capital of the company. The makers of these notes, representing the insurance under the policies of the company issued therefor, are members of the corporation, and mutually liable to the amount represented by their notes for the contracts and liabilities of the company. The aggregate of the policy-holders are, therefore, in a sense the insurer of each policy-holder.

When a company thus organized begins business, it has capital of \$10,000 cash paid in, and \$40,000 in obligations of solvent members of the company in one case, and \$40,000 cash paid in, and \$160,000 in notes of solvent policy-holders or applicants for the same in the other. Its capital is represented by actual insurance. It is free from debt, incapable of contracting liabilities such as that assumed by relator or any other, except in the legitimate business for which it is organized, and may at any time realize upon its unpaid capital. The premiums must be applied to the payment of legitimate expenses and losses, or accumulation of capital. It is clearly apparent the relator company has not complied "with the requirements of the general insurance laws of this State governing fire, etc., insurance companies;" nor is it "possessed of the amount of actual capital required of similar companies formed under the provisions" of the insurance laws of this State. It is manifest that no domestic company organized upon the plan and basis of the relator company, could be permitted to do business under the laws of this State.

The policy of the State towards insurance companies organized under the laws of other States is neither narrow nor illiberal. They are placed upon the same footing, and granted the same rights and privileges accorded to those formed by citizens of the State under its laws. The statutes of the State provide for the organization of companies upon each of the leading and recognized plans of insurance, and providing only such safeguards as in the legislative wisdom are

necessary to promote the best interests of the company itself, and furnish adequate guaranties of safety and indemnity to policy-holders. That this is clearly within the power and control of the legislature as here exercised, is so manifest that no citation of authority is needful to sustain the position.

When we hold as we do, that before relator company is entitled to a license to do business in this State, it must, in respect of its organization, and the security and indemnity it offers its policy-holders, have complied with the general laws of this State, we are applying the same rule that would of necessity be applied to domestic corporations for like purposes. If the rule thus applied results in denying relator company the license it desires, it is because it has failed to comply with the law, and has by its organization, mode of acquiring its capital, and failure to provide the capital required by law of this State for a like company organized here, put itself outside of the domain of legitimate insurance companies, as recognized by the laws of this State.

We are of opinion that the application of the relator company for license to do business in this State was properly refused by the auditor. The demurrer to the petition will, therefore, be sustained, and the petition is dismissed. Writ denied.

SUPREME COURT OF MICHIGAN.

BROWN

vs.

METROPOLITAN LIFE INS. CO.*

Evidence that the agent, having verbally received answers from the insured to questions in the application, had after securing her signature in blank, afterwards on his own motion gone away and filled out the application, did not justify an instruction from the court that the answers could not be considered those of the insured. The question was for the jury whether the answers as written did not agree with those verbally communicated.

An instruction regarding an answer as to last medical attendance, that the jury were not to consider any merely social call of a physician, but an attendance for sickness, was error in the absence of evidence of such call. They should have been instructed that the attendance must have been for some ailment of importance, not for some trivial matter.

Where a subsequent application was made for a second policy, the insurer was not bound to take note of the variance of the answers made in the first application and are not precluded from setting up false answers in the second.

Some disease of a serious nature must be found in order to find the answer of "good health" untrue.

Where the application stated that insured had been treated by Dr. H., it was error to exclude the evidence of Dr. H. as to the fact.

JAMES A. RANDALL (JOHN ATKINSON, of counsel), *for Plaintiff*.

EDMUND HANG, *for Defendant and Appellant*.

MORSE, J.

Plaintiff brought assumpsit in the Wayne circuit court, upon two policies of insurance in the defendant company executed to Mercy Victoria Brown, and payable at her death to plaintiff,—one for the sum of \$500, dated March 12, 1883; and one for the same sum, dated May 26, 1884.

* Decision rendered, April 14, 1887.

Mercy Victoria Brown died on the fourth day of February, 1885. A written application was made for each insurance. The defendant claimed that certain statements in said applications, and warranted to be true, were false, and avoided the policy. In the court below, the plaintiff recovered a judgment for \$886.79. The second policy provided that only two-thirds of the sum insured should be paid. Upon the first policy it was claimed by the defendant that the answers to the following questions in the application were untrue: "Question 15. When last sick? Answer. Nine or ten years ago. Q. 16. Of what disease? A. Typhoid fever. Q. 17. Name the physician who last attended life proposed, and when? A. Dr. Henderson, nine or ten years ago."

It was claimed by the plaintiff that Mr. Wyatt, the agent who solicited the insurance, called at the house with one of the applications (the first one), and asked a few questions. But the answers were not written down there; Mr. Wyatt stating that, because he was afraid his horse would get away, he would write out the answers at the office and forward them to the company. The court instructed the jury that, if they found this claim to be true, and believed the testimony of plaintiff, who is the mother of Mercy Victoria Brown, the defendant company was not in a situation to claim that the answers were not true, and that in such case she would be entitled to a verdict for the amount of the first policy; and that if they did not find her testimony in this respect to be true, and found the answers not to be true, then their verdict should be for the defendant as to the first policy; but in considering the seventeenth question, and the answer thereto, they should construe the same as follows: "Naming the physician who last attended for some disease;" that they should not consider any "merely personal or social call, but an attendance for sickness,—for disease."

The court also instructed the jury as to the second policy, and the application therefor, that as it appeared from the testimony that said company had knowledge, by the first application, of the fact that the answers to the last were erroneous, the defendant could not claim anything from the answers therein being incorrect. In both applications there was a question, "Is said life now in sound health?" Answer in both, "Yes." It is claimed that these answers were untrue. The court directed the jury that, in order to find the answers to be false, they must find that the assured had some disease of a "serious nature;" that a mere temporary ailment, such as a headache, could not be considered as affecting the truth of such answers.

The counsel for defendant claims that the testimony showed beyond contradiction that several physicians attended the assured after the time stated in her first application, and that this undisputed testimony, proving the statement in such application that she was last attended by Dr. Henderson some nine or ten years before 1883 to be false, rendered the first policy issued upon such application void.

The first question to be determined under the first policy is the correctness of the charge of the court that, if Mrs. Brown's testimony was true, the defendant could not make any defense upon the falsity of the answers in the application, for the reason that they could not be considered the answers of Mercy Victoria Brown. Mrs. Brown, the plaintiff, testified that she was present when Mr. Wyatt, as agent of the company, solicited the insurance of her daughter. He took Victoria's signature to the application, and said he would fill it out down at the office. He was at the house not over five minutes. His horse was standing at the gate, and was restless and he was afraid it would get loose and run away. Victoria told him that she had trouble every month; that was all the trouble she had; that she was well, except once a month, when she would sometimes have a sick spell of a day or two. He did not ask her about having any kidney disease, or any other ailment or difficulty. Asked her some questions about her father and mother. He told her to sign the application, and he would take it down to the office, and fill it out. He said he could not wait; he was going to dinner, and his horse would not stand. On cross-examination, she further stated that Wyatt asked Victoria a few questions. He asked her if she was well. She told him she was well, except one thing. He asked her "if she had any doctor, or something; I don't know." She told him she hadn't any. Does not remember whether he asked her what doctor she had, or whether any one else attended her. Her remembrance of the conversation is quite shadowy and indistinct.

Granted that Wyatt did fill out the application after he returned to the office, and yet we do not think that the evidence of Mrs. Brown warranted the charge of the court in respect to such application. It does not appear from her testimony beyond question that any of the answers claimed to be false were not made by Victoria at the interview at the house. If she did answer at the house, as set forth in the application, the fact of such answers being filled in at the office, after she signed the application, can make no material difference in the rights of her beneficiary or the company under said ap-

plication, and the policy issued thereon. The question as to whether or not she made the answers to the agent as written in the application should have been submitted to the jury. If they found that she made the answers, then their truth or falsity should have been inquired into. If she did not make them, or any of them, and they were filled in after she signed, with her knowledge or consent, then, as to such answers so inserted, the company would be precluded from defending because of their falsity. In relation to the answer that Victoria had been last attended by Dr. Henderson some nine or ten years ago, we can find no occasion in the testimony for the instruction of the court that "no merely personal or social call" of a physician could be considered, but it must be an "attendance for sickness,—for disease."

There could be no claim from the record before us that any of the physicians who prescribed for Victoria made any personal or social calls. It appears from Dr. Van Norman's testimony that his services were "professional," and commenced on the sixteenth of October, 1882, and were concluded on the twenty-eighth of May, 1883. There were 14 consultations between those dates. She came to his office each time. He never attended her at the house. Dr. Shurley had professional visits from her at his office between May 20 and June 12, 1881, and attended her once at her home on Lewis Street. Dr. Gilbert saw her five times in July and August, 1880, at her home. None of them stated for what ailment they treated her.

As the questions run in the application (15, 16, and 17, as heretofore given), it may be that the assured would naturally answer the seventeenth with reference to a physician attending her for some sickness or disease of more seriousness than a mere temporary ailment, such as the one indicated by her mother,—trouble with her menses. As these questions and answers ought to be construed liberally in favor of the assured, I am of the opinion that a mere calling into a doctor's office for some medicine to relieve a temporary indisposition, not serious in its nature, could not be considered an attendance by a physician, within the meaning of the question, nor would the calling at the home by the doctor for the same purpose be so regarded. The jury should have been instructed that the attendance of the physician must have been an attendance upon the assured for some disease or ailment of importance, and for an indisposition of a day or so, trivial in its nature, and such as all persons are liable to, who are yet considered to be in sound health generally.

If no reference had been made by the court to the personal or social call, the instruction in this respect would have been as favorable to the defendant as it could claim under the law. We should not reverse the case because of this reference, however, but, as the case must go back for the error already noted, we call attention to the remark as improper because stress is laid upon it by defendant's counsel, and it is claimed by them that it misled the jury.

In regard to the second policy of insurance, Mercy Victoria Brown, as appears by the application for the same, signed by her April 18, 1884, answered these same questions as follows: "Question 15. When last sick? Answer. Never. Q. 16. Of what disease? A. Never. Q. 17. Name of physician who last attended life proposed, and when? A. No."

We have but little evidence of the circumstances under which or how this application was obtained. The application was not, however, filled out in the handwriting of the assured. All that Mrs. Brown can remember is that Mr. Wyatt came there to take additional insurance, and thinks Dr. Kinney was with him. Thinks they both wrote something. Don't remember any questions that were asked, or seeing her daughter sign the application. Dr. Kinney testified to making a medical examination May 17, 1884; the only time he was ever there with Wyatt. He asked her if she had ever suffered with any disease of the kidneys, and she told him she did not think she ever had, but a doctor in New York told her that she had some disease of the kidneys. He thereupon examined her, made up his mind she had no disease of those organs, and wrote "No" after the question. In the written medical examination of Dr. Kinney, introduced in evidence, it was stated that assured never had any illness, but that she had consulted Dr. Gilbert of Detroit and Dr. Jenks of Chicago concerning herself. There was considerable evidence introduced on the part of the defendant of statements of the assured that she was afflicted with disease of the kidneys. She died from "stoppage of her menses," as is shown by the proofs of death. My brothers are of the opinion that, these answers being false, the court should have instructed the jury, as requested, that the second policy of insurance was void, and the plaintiff could not recover upon it. They hold that the insurance company were not bound to take notice of the answers made to the same questions in the application for the first policy, and were not precluded thereby from showing the evident untruth of the answers in the last application.

The court correctly instructed the jury as to sound health at the time the first application was made. The "sound health" evidently meant in the application is a state of health free from any disease or ailment that affects the general soundness and healthfulness of the system seriously, not a mere temporary indisposition which does not tend to weaken or undermine the constitution of the assured. This view is objected to, and it may seem at first blush to be too strong a term to use; but it is difficult to perceive how a person can be in unsound health, or unsound condition of body or mind, without the disease that causes such condition is a serious one. If the affliction is of a permanent character, it must certainly be a serious one; and if it is merely temporary, and passes away without serious results, it cannot well be said to render the person unsound in his general health. The word "serious" is not generally used to signify a dangerous condition, but rather to define a grave, important, or weighty trouble. It was claimed by the defendant, and the tenor of the evidence in its behalf was to the effect, that Victoria had Bright's or some other incurable disease of the kidneys. If this were so, then she had not only a serious, but a dangerous, disease. The court instructed the jury that, if they found the assured had any disease of a serious nature when she made the applications, the plaintiff could not recover. We think the case was fairly put to the jury in this respect.

The court did not err in excluding the testimony of Dr. Childs. He undertook to give a conversation between himself and the mother of Victoria as to her health, when he had already testified that he did not know the condition of Victoria, because he did not examine her, or have any conversation with her at all. The conversation with the mother was clearly incompetent. It was not offered to contradict or impeach Mrs. Brown, but as independent evidence of the girl's health. It could not be received for that purpose.

The photograph of the girl, Victoria, was offered to show the healthy "appearance" of the assured. This was clearly incompetent. No objection was made to its admission, but, after it was received in evidence, an exception was taken. As a new trial must be had, it is not necessary to determine whether, under the particular circumstances of its use as evidence in this case, there was error. No motion was made to strike it out of the case, and it does not appear that it was ever exhibited to the jury, or used in any way after the exception was taken. A majority of the court think that it was error to preclude Dr. Henderson from testifying in answer to the

question as to whether or not he had ever treated the assured for typhoid fever. The fact as to treatment or non-treatment for this disease was not, under the circumstances of this case, a matter of privilege upon which the plaintiff could insist.

It is further claimed that the court erred in permitting Mrs. Brown to testify to matters which varied and contradicted the written statements of the deceased as shown by the application. Mrs. Brown certainly had the right to show by her testimony that the answers made by her daughter at the house were incorrectly written in by the agent after he went to his office, or that he filled in answers at such office that were not made at the house by Victoria. As such answers, if made by the agent, and not by Victoria, or with her knowledge or consent, could not bind her, the fact that they were so made could be established by parol. If the application had not been signed until filled out, a different rule might prevail. The testimony of Dr. Kinney, in relation to what Victoria said about having kidney disease, and his conclusion from such examination that she did not have any disease of those organs, and his so stating in his written report of such examination, was admissible as proof tending to show that she was free from any such disease.

The court did not err in refusing to direct a verdict for the defendant upon both policies, but should have instructed the jury that the second policy was void, under the evidence.

The judgment must be reversed, and a new trial granted, with costs of this court to the defendant. The other justices concurred.

SUPREME COURT OF THE UNITED STATES.

Appeals from the Circuit Court of the United States for the Eastern District of Louisiana.

MERCHANTS' MUT INS. CO. }

vs. }

ALLEN. }

SAME }

vs. }

WEEKS.* }

A vessel, whose home port was known to the insurer to be New Orleans, was insured "to navigate the Atlantic Ocean between Europe and America, and to be covered in port and at sea." A clause of the policy was: "Warranted by the assured not to use port or ports in eastern Mexico, Texas, or Yucatan, nor anchorage thereof, during the continuance of this insurance, nor ports in West India Islands between July 15th and October 15th, nor ports on the northeast coast of Great Britain beyond the Thames, nor ports on the continent of Europe north of Antwerp, between November 1st and March 1st." The vessel was lost on a voyage from New Orleans to Liverpool, in the Gulf of Mexico. *Held*, That the vessel was covered by the insurance at the time of the loss; the language of the policy describing the trade in which she was engaged, rather than confining the insurance to those portions of her voyages which were in the Atlantic.

An overinsurance of the cargo is not a breach of warranty by the owner of the vessel not to insure his interest in the vessel beyond a certain amount.

An overinsurance of cargo, growing out of insurance by a banking firm to protect them as acceptors of drafts drawn by the captain on them to meet disbursements in the purchase of timber, which composed the cargo, does not tend to establish that the loss of the vessel was fraudulent.

Where an ultimate fact is found by the lower court, its finding or refusal to find as to any incidental fact, which is merely evidence of the ultimate fact, will not be reviewed by the United States Supreme Court. Where, therefore, the lower court found that a vessel was seaworthy, its refusal to find that, prior to her last voyage, she was run aground and became so leaky that in the storm that wrecked her when she was thrown on beam ends, she could not right herself, and that she leaked four inches an hour,

* Decision rendered, March 28, 1887.

and the leak could have been discovered only by putting her in a dry-dock, which was not done, will not be investigated by the United States Supreme Court.

Since the act of Congress of February 16, 1875, "to facilitate the disposition of cases in the supreme court, and for other purposes," a case in admiralty cannot be retried in the United States Supreme Court on all the evidence.

JOS. P. HORNOR and C. W. HORNOR, for Merchants' Mut. Ins. Co.

J. R. BECKWITH, for Allen.

C. B. SINGLETON and R. H. BROWNE, for Weeks.

WAITE, C. J.

These appeals present the same questions, and may be considered together. The suits were brought on two policies of insurance, one insuring the interest of George D. Allen, and the other that of Silas Weeks, in the ship *Orient*, from April 15, 1882, to April 15, 1883, "to navigate the Atlantic Ocean between Europe and America, and to be covered in port and at sea." At the time the policy was issued the ship was on the Atlantic Ocean, bound on a voyage from Liverpool, England, to New Orleans, Louisiana, laden with a general cargo. The company knew of this when it executed and delivered the policy, and insured the vessel lost or not lost. New Orleans was the home port of the ship, and there the home office of the company was situated. All parties knew that the ship was sailing to and from that port. The policy also contains this clause; "Warranted by the assured not to use port or ports in eastern Mexico, Texas, nor Yucatan, nor anchorage thereof, during the continuance of this insurance, nor ports in West India Islands, between July 15th and October 15th, nor ports on the northeast coast of Great Britain beyond the Thames, nor ports on the continent of Europe, north of Antwerp, between November 1st and March 1st." This warranty is part of the printed portion of the policy, but the portion describing what the insurance covered is in writing.

The ship arrived safely in New Orleans on her voyage from Liverpool, and, after unloading, proceeded to Ship Island, where she took on a cargo of timber for Liverpool, and while on her voyage to that port she was struck by a cyclone about 100 miles out in the Gulf of Mexico and wrecked.

The first question presented by the appellants is whether the insurance covered the ship while in the Gulf of Mexico. This depends on the meaning of the language of the policy, construed in the light of the circumstances which surrounded the parties at the time of its execution. The evident purpose was to insure a New Orleans ship engaged in the Atlantic trade between Europe

America for a year, both at sea and in port. At the time the insurance was effected, she was on a voyage between Liverpool and Orleans, and all parties knew that the business in which she engaged took her in and out of the last-named port. That was her home port, and that was where the insurance company had its office. That the navigation of the gulf was contemplated during the life of the policy is shown by the fact that certain of its risks were excluded from the risks the company assumed. This exclusion implies that all others might be used, and as the ship was insured all the time during the year if she was employed navigating the Atlantic between Europe and America, whether at sea or in port, it is evident the parties intended to cover her by the policy while sailing from port to port in that general trade. Orleans is a leading American port in that trade. To get to and from it, ships must navigate the Gulf of Mexico.

No one can doubt that the policy would cover at all times during the year a voyage to all the ports of Great Britain, except those to the westward of the Thames, and to all ports on the continent of Europe north of the Mediterranean as far as Antwerp, and elsewhere on the northern coast between March and November. Yet, in going so, the ship would have to sail in waters other than those of the Atlantic Ocean. Taking the whole policy together, we cannot doubt it was the intention of the company to cover the ship engaged in the Atlantic trade between ports in Europe and America other than those specially warranted against. Whether it would include ports east of Gibraltar it is unnecessary now to decide. It is true that, if there is a conflict between the written words of a policy and those that are printed, the writing will prevail; but, if possible, the writing and the print are to be construed so that both can stand. Here we think it clear that the written words, when construed in connection with those that are in print, have the effect of describing the trade in which the vessel was to be employed, rather than confining her navigation exclusively to the waters of the Atlantic Ocean. If it were otherwise, while the ship would be insured in port and on the ocean, she would be uninsured while performing that part of her voyage from the ocean to the port, and from the port to the ocean. Such a condition of things will never be presumed in the absence of the most convincing proof to the contrary. We have no hesitation in deciding that the insurance covered the ship at the time of her loss. This settles all the questions which arise on the finding of facts.

The principal controversy in the case was as to the seaworthiness of the vessel. The court has found as a fact that she was seaworthy when she left Liverpool on the voyage during which the policies were issued, and also when she sailed from Ship Island on the voyage in which she was lost. To these questions the testimony was largely directed, and it was to some extent conflicting. At the trial the court was asked to find as follows: "The ship *Orient*, prior to her departure on her last voyage, on first August, 1882, was run aground on Ship Island bar, where she remained for three days and two nights in bad and squally weather, 'rolling and pounding heavily,' and while on the bar, and after coming off, drew and continued to draw four inches of water per hour until the final wreck, and that, when she was thrown upon her beam ends by the force of the storm, she was prevented from righting herself by the large amount of water which had leaked into her hold, and hence the cutting away of her masts was of no avail, and the said leak was the direct cause of her loss, and she was unseaworthy when she started on her last voyage;" and "that when the ship *Orient* was hauled off the bar at Ship Island where she had been aground as aforesaid, she leaked four inches of water per hour, and said leak did not diminish from said time (third August, 1882) until fifth September, 1882, when she went to sea on her last voyage, nor until she was finally wrecked, and said leak could have been discovered only by unloading said vessel, and taking her to New Orleans, and putting her in the dry-dock, which was not done, and no other precaution was taken to ascertain whether said vessel was injured by having been aground, or to ascertain the leak or leaks, save by a cursory examination of her bottom by a diver, without taking her out of the water;" and "that the ship *Orient* was knowingly sent to sea by the assured in an unseaworthy state and in an unfit condition, which necessarily increased the danger which led to her loss." This was refused, and an exception taken. To present the question of the propriety of that refusal to this court, a bill of exceptions was prepared, containing the entire evidence in the cause, which was signed by the circuit judge, with the remark that "this bill is claimed by the respondent under the authority of *The Francis Wright* (105 U. S., 381), considering which case the court does not feel at liberty to deny the bill."

In the case of *The Francis Wright* it was ruled (page 387), and, as we are satisfied, correctly, "that if the circuit court neglects or refuses, on request, to make a finding one way or the other, on a

question of fact material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal, taken in time and properly presented by a bill of exceptions, may be considered here on appeal. So, too, if the court, against remonstrance, finds a material fact which is not supported by any evidence whatever, and an exception is taken, a bill of exceptions may be used to bring up for review the ruling in that particular. In the one case, a refusal to find would be equivalent to a ruling that the fact was immaterial; and, in the other, that there was some evidence to prove what is found, when in truth there was none." "But," it was added, "this rule does not apply to mere incidental facts which only amount to evidence bearing on the ultimate facts of the case. Questions depending on the weight of evidence are, under the law as it now stands, to be conclusively settled below; and the fact in respect to which such an exception may be taken must be one of the material and ultimate facts on which the correct determination of the cause depends.

In the present case, the ultimate fact to be proved was the seaworthiness of the vessel. That ultimate fact has been found. What the company wanted to have incorporated in the findings were the "mere incidental facts" which only amounted to evidence from which the material fact of seaworthiness or unseaworthiness was to be ascertained. This was properly refused.

Another bill of exceptions was taken, because the court made the following findings, when there was no evidence whatever to support them: "Fourth. That, when said risk was taken by the said defendant, and said policy executed and delivered, the said ship *Orient* was on the Atlantic Ocean, bound on a voyage from the port of Liverpool to the port of New Orleans, in the United States, laden with a general cargo; that the defendant at the time of the execution and delivery of the policy of insurance was well aware of that fact, and had notice and knowledge that the said vessel was prosecuting said voyage, bound to the port of New Orleans, and insured the vessel, lost or not lost. Fifth. That the port of New Orleans was the home port of the said *Orient*, and was the domicile of the underwriting company, and that all parties knew that the ship was sailing to and from that port; and when the policy sued on was issued, it was the intention of the assured and the underwriters that said policy was to cover risks while said ship was navigating the Gulf of Mexico, except excluded ports." "Twenty-first. That, at the time said ship *Orient* was wrecked and destroyed, she

was under the protection of said policy of insurance, and was and wrecked by a peril of the sea insured against."

So far from there being no evidence to support these findings, record is full of facts from which the conclusions reached by court might be drawn. The apparent purpose of counsel in preparing the bills of exceptions was to have the whole case retried here all the evidence. That this cannot be done, since the act of 18 has long been settled. *The Abbotsford*, 98 U. S., 440; *The Benefactor*, 102 U. S., 214; *The Adriatic*, 103 U. S., 730; *The Annie Linna*, 104 U. S., 187.

The case as tried below is reported as *Baker vs. Merchants' M Ins. Co.* (16 Fed. Rep., 916) where the discussion upon the effect the evidence will be found.

It only remains to consider an application which has been made this court for leave to amend the pleadings and introduce new testimony. At an early day in the present term leave was granted appellants on their motion to take additional testimony. Under leave depositions have been taken which are now on the file. The purpose is to show an overinsurance by the owners of the vessel the cargo, which was also owned by them in whole or in part. The pleadings, as they stood in the court below, present no issue which such testimony is applicable, and the appellants now ask leave to amend their answers so as to let it in. Without determining whether since the act of February 16, 1875, "to facilitate the disposition of cases in the supreme court, and for other purposes" (chapter 77, 18 St., 315), new testimony can, under any circumstances, be taken after an appeal in admiralty to this court, or amendments to the pleadings allowed, and, if so, what would be the proper practice to give effect to an application for that purpose, we deny the motion. An overinsurance of the cargo is not a breach of a warranty by the owner of the vessel not to insure his interest in the vessel beyond a certain amount, and the new testimony, standing itself, fails to make out such a case of overinsurance on the cargo as would tend to establish a fraudulent loss of the vessel. The overinsurance of the cargo, if any there was, grew out of an insurance by *Barring Bros. & Co.*, in London, for their protection as acceptors of drafts drawn by the captain on them to meet disbursements in the purchase of the timber which composed the cargo; at least, that is the fair inference from the testimony.

The decree in each of the cases is affirmed.

SUPREME COURT OF IOWA.

STATE INS. CO. }
 vs. }
 RICHMOND.* }

Insurance was obtained by a soliciting agent on a hotel in course of completion and not yet occupied, which he represented to be occupied, lighted with gas, and heated with coal. The agent acted in good faith, but through a misconception of his duty. The risk was not of a kind which the company did not insure against. The company upon payment of the loss sued the agent to recover the amount so paid.

That the question was simply one of rates, and the company could not recover without showing that it had been damaged in the matter of rates.

ADAMS & WRIGHT, *for Appellant.*

C. COOK and J. H. CALL, *for Appellee.*

ADAMS, C. J.

The defendant was the plaintiff's soliciting agent in Kossuth county. As such he solicited and obtained from one Jordan an application for insurance upon a building erected for a hotel, but not yet completed. At the date of application and issuance of the policy, the building was not occupied as a hotel, but it was expected that it would be in a short time. In the application, however, the building was described as occupied as a hotel. The defendant knew the facts, but did not inform the plaintiff, and the policy was issued, as may be presumed, in reliance upon the statement as contained in the application. Before the building became occupied as a hotel, it was destroyed by fire. Action was brought upon the policy. The company set up as a defense the false state-

Decision rendered, March 18, 1887.

ment in the application ; but the defense proved unavailing because of the agent's knowledge that the building was not occupied as a hotel, and the insured was allowed to recover. This action is brought to recover of the agent the amount which the plaintiff was compelled to pay on the policy.

The division of the answer demurred to is as follows : " And for a separate and distinct, full and complete, defense, defendant says that when the policy was sent by the plaintiff to the defendant it was with instructions to deliver the same to Jordan, and collect the premium ; that while it is true that at that time the building was not occupied as a hotel, with sleeping rooms in the second and third stories, and was then in an unfinished condition of completion, preparatory to being soon occupied, and was not occupied by a tenant, and it was also true that there was no stores in the building, and no kerosene was used for lights, nor were any lights of any kind used, and no coal or other fuel was used for fire, nor were any fires therein used, and there was in fact no furniture therein, all of which in a general way the defendant knew and did not communicate to the plaintiff,—yet he avers and says that each and all of said several matters were wholly immaterial, and none of them in any manner or degree increased the risk or hazard or danger ; that in truth and in fact the absence of such matter only decreases the risk, hazard, and danger ; that the matters and conditions aforesaid, and the true condition of said building was less hazardous than as represented in the application and policy ; that the regular premium which plaintiff, and insurance companies generally, would have charged for insuring said building in its true condition was less than had it been as represented and described in the application for insurance, and that plaintiff would have taken the risk at the same rate had defendant informed it to the full extent of his knowledge ; that defendant had no instructions or objections except as contained in a written appointment and bond set out and attached to the petition, and in the entire matter acted in good faith and without any fraudulent intent ; and defendant says that he has at all times duly performed his duties as such agent of plaintiff, except as herein set forth, which defendant insists is a violation of his contract with plaintiff and is a breach of any instruction."

In the argument of the appellant's counsel considerable is said which has nothing to do with the question, as to whether the appellant's demurrer to the appellee's answer ought to have been sustained.

ed. The appellant's counsel say that "the conduct of the at was as flagitious as can be conceived." But the answer de- red to contains an averment that "the defendant in the re matter acted in good faith, and without any fraudulent in- ;" and this must be taken as true, unless there are other ad- ed facts which show otherwise, and we do not see any. The ication should, of course, have contained a statement that the ding was soon to be occupied as a hotel; but if the agent had on to suppose that it would be thus occupied before the policy ld be issued, or so soon thereafter as to make no material dif- nce, his conduct might be attributed to a misconception of his y rather than a fraudulent intent; and if it might be thus at- uted, then we are bound to take the averment of the answer as

onsiderable is said in the argument of appellant's counsel about appellant being drawn wrongfully into an insurance of a car- er's risk; but there is no good reason for this. It is true that verred in the petition that the building was in process of nstruction, and it appears to be admitted that the building was in nfinished condition, but to what extent does not appear, and an easily conceive of things remaining to be done which would ifestly involve no additional hazard. Besides, it is not material e question before us that the building was unfinished, even if ething remained to be done which involved additional hazard. ere was no statement in the application that the building was hed, nor warranty in the policy to that effect, nor is it claimed e appellant's petition that the appellant was precluded from a eessful defense predicated upon such ground. The building ht have been occupied as a hotel, and warmed and lighted as esented, without being entirely finished; and if it had been e, there would have been nothing to complain of.

he untrue statements in the application, which the appellant up as a defense against the insured, and which it now sets up round for recovery against the appellee, are three in number, are as follows: That the building was occupied as a hotel; kerosene was used for light, and that coal was used for fuel. facts, as shown by the pleadings, are that the building was not upied at all, and that it was not lighted nor warmed in any way. re is no pretense, so far as the pleadings show, that the unfin- d condition of the building has any materiality. This fact is

made to do service nowhere except in the argument of appellant's counsel.

We have said this much for the purpose of eliminating extraneous matters. We may go a little further, and say that we do not understand the appellant as seriously complaining of the absence of kerosene or fire in the building. We are virtually, we think, reduced to the complaint that the building was not occupied as a hotel. How precisely it was occupied we do not know, nor is it material to inquire. The case before us, then, is this: The appellant, through a misconception by its agent of his duty while acting in good faith (as the answer avers) was drawn into the insurance of a building at a rate of premium fixed for the insurance of a building occupied as a hotel, which in fact had not commenced to be thus occupied, but was expected to be soon, and the agent knew it was not yet occupied in that way. The property was burned before occupancy. The company retained the premium, viz., \$80, paid the loss, viz., \$3,000, and some interest, and sues its agent to recover of him the whole amount paid. The actual risk was not greater than it was represented to the company to be when it issued the policy, and the premium received and retained was greater than the premium charged for an unoccupied hotel building with neither lights nor fires in it. We state these as the facts, because, upon the question raised by the demurrer to the answer, they must be assumed to be true.

The legal question presented is as to whether an insurance company can recover damages of its agent through whose fault, while acting in good faith, it is drawn into a contract of insurance somewhat different from what it supposed it to be, but not less valuable to it. In answer we have to say that we do not think it entitled to recover substantial damages. Whether it should be allowed nominal damages we need not determine, because, if we should conclude that it might, we could not reverse for the mere purpose of allowing such recovery: *Watson vs. Van Meter*, 43 Iowa, 76.

We are not prepared to say that the insurance of an unoccupied building is not in fact regarded by insurance men as involving a greater risk than the insurance of an occupied building, even though it be occupied as a hotel, and is three stories high, and lighted with kerosene lamps; but, for the purpose of this case, it must be assumed to be the reverse. The case, then, is not different from what it would have been if the false statement relied upon had been simply that the building was lighted with kerosene lamps,

when in fact it was lighted with candles or gas, or that coal was used for fuel, when in fact it was heated by steam transmitted from other premises. It is possible that in such case, if the condition had been warranted, there would have been a breach of warranty; but there would have been no ground for recovery of more than nominal damages against the agent.

It is a very important consideration that the company was not drawn into a contract of insurance against a risk which it does not insure against. There is no pretense that the insurance of unoccupied buildings is not a part of the business of the company upon which it makes its profits. It is a matter of common knowledge that insurance companies do such business, and the fair inference from the pleadings in this case is that the appellant did such business, charging such rates as are usual for such risks, or as it deemed proper. It is a question, then, of rates, and nothing more, so far as any question of substantial damages is concerned. The appellant received \$80 as a premium on a policy of \$4,000, and on the supposition, formed from the broad experience of insurance companies generally, that less than one in fifty of such risks would result in loss. According to the averment of the answer demurred to, the risk was actually less than the company was paid for. If it had had enough such risks it would have made more than its usual profits. This is not a mere matter of uncertainty and speculation. While there is nothing more uncertain than whether a given building will be destroyed by fire or not within the life of a given policy, the average of losses is such that the business of insurance is, we believe, regarded as about as reliable as most others. At all events, premiums are charged upon the theory that they can be relied upon, and the business be safely done. We are justified, then, in saying that, upon a question of damages for fault of agent, it is a question of rates in any matter which is covered by the company's rates. The cases cited by the appellee, *McDermid vs. Cotton* (2 Bradw., 297) and *Davis vs. Garrett* (6 Bing., 719), involve a different principle.

If a merchant's clerk should sell goods on credit, which he is employed to sell in that way, and to a person to whom he might properly sell, but for a price less than he was expressly required to obtain, the measure of the merchant's recovery against the clerk in an action for damages would unquestionably not be greater than the difference between the two prices, and that, too, even if the buyer should become insolvent, and not pay anything. If, on the

other hand, the clerk should sell property of his employer of a kind which he was not employed to sell at all, he probably would be held responsible for the whole value. A principle would be involved not very unlike that in the cases cited.

Having, then, reached the conclusion that the risk assumed was within the appellant's business, and that it is only a question of rates, the appellant should have shown, before it could recover more than nominal damages, that it was damaged in the matter of rates. With this view the judgment must be affirmed.

SUPREME COURT OF NORTH CAROLINA.

J. R. CUTHERTSON

vs.

NORTH CAROLINA HOME INS. CO.)

ch matters alleged and denied, as are necessary to dispose of the controversy are legal issues.

absence of fraud or mistake a party will not be heard to say that he is ignorant of the contents of a contract signed by him, and where an action is part of the policy, evidence is inadmissible to prove that questions answered in it were not asked the applicant who appended his signature.

ered built on the land of another on condition that the building should remain the land-owner at the expiration of the term agreed on.

that he was not absolute owner in fee of the building.

the policy is on building, contents, etc., each separately valued and insured for a specific sum ;

that the contract is entire and a breach or misrepresentation as to one part affects all.

INGTON & ADAMS for Plaintiff.

KEE, for Defendant.

DAVIS, J.

was a civil action tried before Avery, Judge, at May term of Union Superior Court.

the 17th day of November, 1882, the defendant company, for insured certain property of the plaintiff, against loss by fire, for six months, beginning at 12 o'clock m. on that day, and issued a policy therefor, in the sum of \$1,000. On the night of February 6, 1883, while said policy was in force, a portion of the property embraced therein was destroyed by fire, worth, as plaintiff claims, the sum of \$1,000, which sum, though demanded, the defendant refused to pay.

fendant company refuses to pay, and this action is brought for its recovery.

The application and policy of insurance are set out in the pleadings.

The defendant denies the right of the plaintiff to recover, and says that he did not have such an ownership of, or interest, title, and estate in the property described in the policy as was represented by the plaintiff in his application.

For a further defense the defendant says that the plaintiff, in his application, which was a part of the contract, represented that he was the sole and absolute owner, in fee, of the property insured, and that there was no lien, incumbrance, or claim whatever against it, and that in response to questions propounded, the plaintiff failed to disclose fully and truly his interest in said property, and that he was not the sole and absolute owner thereof.

It is stipulated in the policy that in the event of loss, suit or action for the recovery of any claim by reason thereof shall be commenced within one year, and the defendant says this action was not commenced within one year, as required by the said provision.

The property is described in the policy, with value and insurance, respectively, as follows: gin-house, value \$250, insured for \$108—two gins and one feeder, \$350—\$153, seed-cotton in gin-house, \$150—\$63, loose lint cotton, \$50—\$19, cotton seed, \$75—\$31, steam engine and boiler located about 12 feet from gin-house, \$1,000—\$231, belting and shafting, \$175—\$75, grist-mill and fixtures, \$200—\$80, saw-mill and fixtures, \$350—\$153, cotton-press in gin-house, \$190—\$81.

The plaintiff tendered the following issues at the close of the evidence:—

1. Did the plaintiff at the time of his application for insurance and at the time his policy was issued thereon, have such an interest in the property insured or any part thereof as was the subject of insurance; if so, what part?
2. Did the plaintiff at the time of his application make any false representation as to his ownership of said property or any part thereof; if so, what part?
3. Did the plaintiff at the time of his application make any false representation as to any lien, incumbrance, or claim on said property or any part thereof; if so, what part?
4. Did the plaintiff comply with the conditions and stipulations of the contract of insurance on his part?
5. How long after the plaintiff's cause of action accrued before this suit was brought?

6. Is the defendant indebted to the plaintiff in any sum under the said policy of insurance; if so, how much?

His honor refused to submit these issues, and in lieu thereof submitted, among others the following:—

1. Was the plaintiff, at the time when his application for insurance was made, the sole and undisputed owner of the engine and boiler, the belting and shafting, and the saw-mill, and smoke-stack, holding them free of any claim or incumbrance, as represented in the application?

3. Was the plaintiff, at said time, the undisputed owner of the gin-house mentioned in said application and policy?

6. Did the plaintiff commence this action within the time limited for the commencement thereof by the contract of insurance?

The plaintiff excepted to the refusal to submit the issues tendered by him, and to the first, third, and sixth issues submitted by the court, and this is the first error assigned.

The issues are made by the allegations of the complaint and denials of the answer, and should be only such as are necessary to determine the controversy between the parties. Often questions of fact are alleged and denied, which, whether found one way or the other, do not, in themselves, decide the issue or issues involved, and it is not necessary, but often improper, to submit such questions of fact to the jury.

In *Cedar Falls vs. Wallace* (83 N. C., 227) Dillord, J., approving *Albright vs. Mitchell* (70 N. C., 445), says: "It is not every matter alleged on one side and denied on the other that, in a legal sense, is an issue, but only such as are necessary to dispose of the controversy; and to such necessary matters the issues submitted ought to be confined as far as possible, in order to avoid embarrassment and confusion to the jury from a multiplication of issues."

The form in which issues are submitted is of little consequence, if the matters in controversy are clearly and fairly presented by them to the jury, but all immaterial and unnecessary issues should be avoided. In this case wherein issues were submitted, some of them relating to the ownership of the different portions of the property mentioned in the application for insurance, and to the values of separate parts of it, and which do not, however found, decide the controversy, but no exception was taken to these, and unnecessary issues are not assignable for error, if not prejudicial, even if excepted to, and we only allude to it here to suggest that in framing issues for the jury only those presented by the pleadings which are decisive

of the matters in controversy should be submitted, and under proper instructions from the court these may often be greatly narrowed.

In this case the issues submitted by the court, in lieu of those tendered by the plaintiff, though several of them may be unnecessary, present fully the matters in controversy. The first, third, and sixth only are objected to, and these relate to material facts alleged and denied, and the exception cannot be sustained.

We can see no error in rejecting the issues proposed and the substitution of those submitted.

Among the questions propounded in the application for insurance, and the answers thereto, were the following:—

“Q. Are you the sole and undisputed owner absolutely and in fee simple of the said property as severally mentioned, and of the land on which it stands? If not, state fully what your interest is?

“A. All but the land.”

Is there any lien or incumbrance on, or any claim whatever against the said property?

“A. No.”

At the foot of the application, and next preceding plaintiff's signature thereto, is the following: “I affirm and warrant that the foregoing answers are true, and that they shall constitute the basis of the policy to be issued to me on this application.”

[Signed by J. R. Cuthertson].

The plaintiff proposed to prove that the questions referred to were in fact not asked, and that he signed the application without knowing that it contained them. This was objected to, and objection sustained, and this is excepted to.

It is conceded that the plaintiff could read and write, and that he signed the application with his full name. That the application forms a part of the contract is clearly established by authority: *Babbitt vs. Ins. Co.*, 66 N. C., 70, and the authorities there cited.

The applicant warrants the answers to be true, and it enters into and forms a part of the contract: *May on Insurance*, sec., 183. The same author says, sec. 185: “The inquiry and answers are tantamount to our agreement that the matter inquired about is material, and its materiality is not, therefore, open to be tried by the jury,” and for this he cites many authorities.

There was no error in excluding the proposed evidence. In the absence of fraud or mistake, a party will not be heard to say that he was ignorant of the contents of a contract signed by him.

There was evidence in regard to the third issue, and it was argued at length before us, but in the view which we take of it as immaterial whether the action was brought in proper time or not, as the plaintiff is not entitled to recover on the first or the other issues, and we consider the only remaining alleged error which was in regard to the instruction of his honor to the jury upon the first issue.

The only evidence upon this issue was that of the plaintiff, who testified: "That the gin-house was built by him on the land of McLeod, he having leased it for three years, and that it was an agreement between him and McLeod that plaintiff might build the house and use it during his term, and that at the end of the three year term, or if extended, at the end of the extended term, the house should remain on the land and belong to McLeod; that at the time of the fire, one-half of the time had expired, and there was an agreement made for an extension. Then he bought the boiler, smoke-stack, saw-mill, belting, and shafting, from the Manufacturing Co., under a written contract of sale, by which it was agreed that said property was to remain in said company until the purchase-money was fully paid; that only part of it had been paid at the time of the application, and at the time of the fire." The court instructed the jury that if they believed this evidence, they should respond "no" to the first issue. The alleged error in this instruction is not pointed out, and we can discover none.

The jury responded "no," to the first issue, and in response to the other issues, they found that the plaintiff was not the owner of the gin-house, and that he was the owner of the two gins, and feeder, and the seed and lint-cotton, cotton-seed, belting, shafting, and press. That the value of the house was \$250, the gin \$100, the cotton, belting, and shafting \$370.50, the engine, boiler, etc.,

and in this verdict there was a judgment for the defendant. The plaintiff has insisted in this court that the contract was not entire, but was a lease, and that the plaintiff was entitled to so much of the insurance as covered the property which was owned by him, notwithstanding the finding of the jury upon the first issue. The question is considered and the decisions bearing upon it reviewed in May on Appeal, Sec. 277, 278, and the conclusion to be drawn from them is that in a misrepresentation or breach, where the contract is entire, all the property insured, though it may be of different kinds,

and separately appraised in the policy, and this view is sustained by the ruling of this court in *Biggs vs. Ins. Co.*, 88 N. C., 141.

The jury find that the plaintiff was not the owner of a portion of the property, of which, in his application, he represented himself to be the owner, and this misrepresentation as to his interest avoids the policy: *Wood on Insurance*, § 179; *May on Insurance*, § 287; and *Babbitt vs. Ins. Co.*, *supra*.

There is no error, and the judgment must be affirmed.

Let this be certified.

SUPREME COURT OF MICHIGAN.

Error to Oakland.

BRIGGS

vs.

FIREMAN'S FUND INS. CO.*

action to recover on a fire insurance policy which contained a provision voiding the policy for false representation or overvaluation, it is reversible error in the court, in submitting to the jury the question of an overvaluation, with direction to find for or against the plaintiff accordingly, to submit at the same time the question as to whether or not the forfeiture under this provision had been waived.

action to recover on a fire insurance policy, the fact that the company's agent goes to the scene of the fire, and makes inquiries, and requests an arbitration, which is expressly provided for in the policy by a provision that the policy-holder shall pay half, and that the same shall not work a waiver of any of the insurance company's conditions in the policy, does not constitute a waiver by the company of any right of forfeiture.

THOMAS J. DAVIS, for Plaintiff.

A. BAKER, for Defendant and Appellant.

CHAMPLIN, J.

This is an action on a fire insurance policy. The defense is that of overvaluation. In her application for insurance she stated the value of the dwelling-house to be \$1,800, and the defendant insured it for \$2,000. The application also contained this clause: "And the said insured hereby covenants and agrees to and with the Fireman's Fund Insurance Company that the foregoing is a just, full, and true statement of all facts and circumstances in regard to the condition, location, value, and risk of the property to be insured; and said an-

dition rendered 1, February 10, 1887 — From *Northwestern Reporter*.

swers are considered the basis on which insurance is to be effected and the same is understood as incorporated in and forming a part of the policy, and a warranty on the part of the assured, whether or not referred to in that instrument or not, and whether the said answers have been written by the agent of said company or not; and the assured further covenants and agrees to make known to the said company any material change in the risk or its surroundings, which may take place during the life of said policy." The policy contains the following provision: "Any false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known any fact material to the risk, or any overvaluation of the property, or any misrepresentation whatever, either in a written application or otherwise," etc., "then, and in every such case, this policy shall be void." And also the further provision: "The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same, and in case of the depreciation of such property by reason of age, wear and tear, location, change in style, lack of adaptation to profitable use, or other causes, a suitable deduction from the cash cost of replacing shall be made, to ascertain the actual cash value; and the assured hereby expressly waives all right, arising under any State or other law, to collect of this company in case of loss, any sum in excess of the true and cash value of the property herein insured, which value shall be determined as herein provided." Another clause provides that in case differences shall arise concerning the amount of any loss or damage, arbitrators shall be appointed at the request of either party, and their award shall be binding on the parties as to the amount of loss or damage, and they shall not decide the liability of the company under the policy, or one-half of the appraiser's fee to be paid by the assured.

Under this provision of the policy the defendant requested a submission to arbitration, and the parties signed a submission in writing, in which it was stipulated that the appointment of arbitrators was without reference to any other question or matter arising in difference within the terms and condition of the insurance, and that it was not to be taken as any waiver on the part of the company of the conditions of the policy in case they should elect to avail themselves thereof; and it was expressly agreed that the arbitrators were to take into consideration the age, condition, and location of the premises before the fire, and also the value of the walls, materials, or any portion of said building saved, and, after making

ate of the cost of replacing said building, a proper deduction be made by them for the difference between the value of a or replaced building and the one insured. The appraisers and, after making the proper deductions, determined the damage to be \$973.87. In arriving at this amount, one of them testified deducted 25 per cent, and the other that they deducted 30 cent from the value of the old building for new. There was controversy in the case which placed the value of the building, including foundation, at \$1,900, others at \$1,800, and so on down to \$1,450.

The jury was asked to find specially what the cash value of the house destroyed was at the time it was insured, and they found it to have been \$1,450.

The circuit court instructed the jury "that the application is a part of the contract and policy, and a warranty, and the representations of value contained in it are warranties. If the jury find that the plaintiff made a substantial overvaluation of the property insured, the application for the insurance, the defendant company is entitled to your verdict. While some latitude may be allowed for difference of opinion in determining a question of value, yet if, after giving due allowances for such differences, the jury find there to be a substantial overvaluation, the plaintiff cannot recover." This instruction to the jury was correct. The application and the policy bear the same date, and refer to the same subject-matter. They are substantially one instrument. Taken together, they constitute the contract between the parties. The representation as to the value of the property insured was material. The object of requiring a statement of the value of the property insured is apparent. It enables the company to determine the amount of the risk they are willing to assume. No company doing a legitimate business insures property by an unvalued policy to its full cash value, without charging at least a premium proportionate to the risk. The temptation to convert property insured to its full cash value for money, at the expense of the insurance company, is recognized as one of the hazards attending such insurance.

In this case it will be observed that the company did not intend to insure the property to the extent of its cash value; for, while the cash value was represented to be \$1,800, the risk assumed by the company was only to the extent of \$1,400, or about three-fourths of the cash value as represented; and, if the finding of the jury is correct, the criticism of the true cash value of the building destroyed, and the fact that the plaintiff obtained an insurance within \$50 of its actual cash

value. Nor is this warranty of the value contained in the policy neutralized or rendered inoperative or immaterial by that provision of the policy which provides that in no case shall the company be liable to pay more than the true cash value of the property insured. This is all they could be compelled to pay in an unvalued policy, without such clause, and was evidently inserted for greater caution, and to prevent a claim being set up that the policy is a valued one.

The testimony showed that the application for the insurance was filled out by the agent of the company, and delivered to the plaintiff's husband, who took it to his wife, and afterwards returned it to the agent, signed by the plaintiff; and upon this testimony the plaintiff's counsel claims that the plaintiff is not responsible for any misrepresentations which it contains. There was no evidence introduced showing the source of the agent's information as to the facts stated in the application. Likewise there is an entire absence of testimony showing what occurred when the application was presented to the plaintiff for her signature. The presumption is that she read the application, and was fully acquainted with its contents. Before the rule contended for by the plaintiff could apply, it should be shown either that the plaintiff was imposed upon in signing the application, or that the agent knew the true value of the building, and overvalued it in the application, knowing that such statement was incorrect: *Stone vs. Hawkeye Ins. Co.*, 28 N. W. Rep., 47; *May, Ins.*, §§ 141-144; 2 *Wood, Ins.* (2d ed.), 1,161-1,169.

It is urged that the case of *Schmidt vs. City & Village Fire Ins. Co.* (55 Mich., 432; 21 N. W. Rep.), 875, decides the question as to overvaluation in this case. That case is distinguishable from this. That was a case of mutual insurance. The charter and by-laws were made a part of the contract of insurance, and it was agreed that the company should not in any case pay more than three-fourths of the cash value of the buildings insured, if they were insured to that amount. With such a provision as this, it could make no difference to the company whether the property was overvalued or not.

Whether or not there was an overvaluation in this case was, under the evidence, properly submitted to the jury; and had this been the only question left to them, and they had found a verdict for the plaintiff under the instructions given upon this subject, we should not consider it proper to disturb their verdict. But we do not

know that the jury found for the plaintiff on this issue, for the reason that the circuit judge submitted to the jury the question whether or not the forfeiture under this clause of the policy had not been waived by the company. There is nothing in the record which shows whether the verdict for the plaintiff was based upon the fact that there was no overvaluation, or whether there was an overvaluation, and the forfeiture thereby had been waived. We have examined the record carefully, and there does not appear the least scintilla of evidence tending to show a waiver, or from which it can be inferred. The court erred in submitting that branch of the case to the jury.

It is claimed that the fact of the agent of the company going to the scene of the fire and making inquiries, without showing what such inquiries were, and of requesting an arbitration to fix the amount of the loss, and the plaintiff paying one-half the expense of the arbitrators, constituted a waiver of any forfeiture on the ground of overvaluation. We cannot concede this claim. The company had a right to make inquiries—to investigate—both as to the origin of the fire and the value of the property; and the contract between the parties was that an arbitration for the sole purpose of determining the amount of the loss might be had upon the request of either party, and that the expense thereof should be borne equally; and the agreement to arbitrate expressly stipulated that such submission should not be taken as a waiver on the part of the company of the conditions of the policy. In view of these facts, there is no room for claiming a waiver on the part of the company,

The judgment must be reversed, and a new trial granted.

Campbell, C.J., and Morse, J., concurred. Sherwood, J., did not sit.

UNITED STATES CIRCUIT COURT.

NORTHERN DISTRICT OF CALIFORNIA.

WILLIAM TENNANT, ADMR.,

VS.

TRAVELERS INS. CO.*

Where a renewal was delivered without payment of premium; *Held*, That a custom of the agent to give credit for the premiums if ratified by the company by knowingly receiving and retaining them is a waiver of a stipulation in the policy that it shall not be binding until payment of premium, and that no agent can waive the condition without special written authority.

Where the agent filled out the renewal at the request of insured, and at his request also retained it in the office, the receipt was virtually in the possession of the insured and the contract was binding.

Where the evidence showed death in a bath as the result of epilepsy, and that abrasions were received in falling, but the bruises were not sufficient to cause death, the death resulted from other causes than external, violent, and accidental means within the intent of an accident policy.

Ross, J.

This action is brought by the administrator of the estate of William Tennant, deceased, to recover the amount of a policy of insurance issued by the Travelers Insurance Co. of Hartford, Conn., to the said Wm. Tennant on the 20th day of June, 1881. For defendant it is contended that the policy, as originally issued, was void by reason of certain alleged false statements contained in the application upon which it was based. I do not think the evidence shows that there was any misrepresentation of fact in the application, and the finding will therefore be against defendant on that issue. But the defendant resists the action on two other grounds: one being that, con-

* Decision rendered, April 18, 1887.

ceding the validity of the policy as originally issued, it was not in force at the time of the death of Tennant; the other, that his death was not caused by external, violent, and accidental means within the intent and meaning of the policy.

According to its terms the policy expired at noon of the 20th of June, 1882. But it was continued in force from year to year until noon of the 20th of June, 1885, by the issuance to the insured party of renewal receipts expressly continuing it, subject to the provisions and conditions therein contained. The evidence shows that it was the custom of the company to send such renewal receipts, signed by the secretary, from the home office, in blank, and they were intrusted to the commissioned agents of the company, with authority to countersign and deliver the same from time to time as occasion required, for the purpose of continuing in force expiring policies. The evidence further shows that notwithstanding a clause of the policy to the effect that the actual payment of the premium before the happening of any accident is a condition precedent to its binding force, and that no waiver shall be claimed by reason of any act or acts of any agent unless such act or waiver be specially authorized in writing over the signature of the president or secretary of the company, the custom of the agents of the defendant was to give credit on the premiums, and such custom was acted on by the patrons of the company generally, and by the deceased in the present case, and was approved and ratified by the company by receiving and retaining, with full knowledge of the facts, the premiums paid pursuant to such credit. There is no difficulty, therefore, in holding that the policy in suit was continued in force until noon of June 20, 1885, by virtue of the delivery to the insured of the renewal receipts and the subsequent receipt and retention by defendant of the premiums due thereon. "The law of agency is the same," said Mr. Justice Field, in delivering the opinion of the court in *Insurance Co. vs. Wolff* (96 U. S., 330), "whether it be applied to the act of an agent undertaking to continue a policy of insurance, or to any other act for which his principal is sought to be held responsible. The principle that no one shall be permitted to deny that he intended the natural consequences of his acts when he has induced others to act upon them, is as applicable to insurance companies as it is to individuals. The principle is one of sound morals as well as of sound law, and its enforcement tends to uphold good faith and fair dealing. If, therefore, the conduct of the company in its dealings with the assured in this case, and with others similarly situated, has been such as to

induce a belief that so much of the contract as provided for a forfeiture if the premium be not paid on the day it is due, would not be enforced if payment were made within a reasonable period afterwards, the company ought not, in common justice, to be permitted to allege such forfeiture against one who has acted upon the belief, and subsequently made the payment. And if the acts creating such belief were done by the agent and were subsequently approved by the company, either expressly or by receiving and retaining the premiums, the same consequences should follow."

But in the case at bar the insured died on the 22d day of June, 1885. At the time of his death no premium had been paid for insurance beyond noon of the 20th of June, 1885, and it is insisted on behalf of defendant that, prior to his death, no renewal receipt had been issued by defendant's agent purporting to continue the policy in force. If the matter last mentioned be true, then, clearly the policy expired with noon of June 20, 1885; for no agent can any more bind his company by issuing a renewal receipt after the death of the insured than he could by issuing an original policy in favor of a dead man. But is it true that the receipt in question was not issued until after the death of Tennant? There is no reason to doubt the testimony of the agent to the effect that on the 20th of June—while the policy was in force—he filled out and countersigned a renewal receipt purporting to continue the policy for another year, and that he did this by direction of the insured, who requested the agent to retain the receipt in his office, but for the insured; and it was there at the time of the death of the latter. The mere manual possession of the policy, or, in this case, the renewal receipt, is of little consequence. "Its possession by the insured makes a *prima facie* case for him, subject to be met by proof that it was never delivered by the consent of the insurer; while its possession by the insurers makes a *prima facie* case for them, subject to be met by proof that, though not transferred, it was intended by the parties to be a valid contract, without further action by either, and so in legal contemplation that there was a delivery." May on Insurance, Sec. 56. When the agent of the defendant, while the policy was running and during the lifetime of the insured and by his direction, filled out and countersigned the renewal receipt, he did precisely what the company authorized him to do. He was constituted its agent to contract with the insured for a renewal of the policy and was intrusted with receipts in blank, signed by the secretary of the company, with authority to fill out and counter-

them in execution of such contracts. And when, pursuant to that authority, the agent, at the request of the insured, filled out and countersigned the receipt in question and thereupon assumed the responsibility of it for the insured, the contract of insurance became complete and effectual: *Ins. Co. vs. Colt*, 20 Wall, 569; *May on Ins.*, 60, and authorities there cited. I must find, therefore, that the receipt was issued on the 20th of June, 1885, during the life of Tennant.

As to the objection that the premium was not paid until after his death, the answer is, that the agent, pursuant to custom known to and ratified by the company, extended to the insured credit for the premium, and the latter, relying upon the credit thus extended, in deference to the company, deferred making the payment, it would manifestly operate as a binding upon him to hold that the insurance did not become operative until the premium was actually paid.

The last point made for the defendant, however, I think, must be sustained. It is, among other things, provided by the policy that the insurance shall not extend to "any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which has been caused wholly or in part by bodily infirmity or disease existing prior or subsequent to the date of the contract. . . . nor to any case except where the injury is the proximate sole cause of the disability or death." And further, that no recovery shall be made under the policy. . . . "where the death or injury have happened while the insured was or in consequence of his being under the influence of intoxicating drinks."

The evidence shows that the deceased was found dead in the hot water bath at Gilroy Springs, in Santa Clara County, about 11 o'clock P. M. of the 22d of June, 1885, in almost a standing position, with his right hand firmly holding to the pipe that supplied the bath with water, and his head so drooped that the surface of the bath extended above his nose but left the top of his head exposed. There was an abrasion between his eyes and a bruise on one side of his head. The bath was eight or ten feet square and the water from four to five feet in depth. The deceased was 5 feet 8 inches high and 140 pounds in weight. The water is naturally warm, its temperature being from 100 to 105 degrees, the result being to fill the bath with hot steam should the door be closed. In this instance the door was closed, the deceased having locked it from the inside.

It further appears from the evidence that for many years the deceased was a free drinker of intoxicating liquors, and that for the

last few years of his life he was a heavy drinker. His physician testified at the trial that during the latter part of his life he drank to such excess as to bring on epileptic fits, from the effects of which he (witness) had relieved him. This witness further testified that upon the recovery of the deceased from such attack, he would resolve to cease drinking altogether, and that at the time of his death he was endeavoring to stop, but stopped too suddenly. He testified further, in substance, that the entrance into the bath in question of one in the then condition of the deceased, would be likely to result in an epileptic attack, and that the fall or blow that caused the abrasion between the eyes and the bruise on the side of the head, were not sufficient to have caused death.

When it is considered that the evidence shows that the abrasion and bruise were but slight, and that the deceased when found was in almost a standing position, with his right hand firmly grasping the supply-pipe, it is impossible to believe that his death was caused by a fall or blows. In view of all the facts and circumstances of the case, considering the condition of the deceased at the time of and just previous to his death, the probable effect of the heat of the bath upon one in his condition, his position when found and the condition of his body after death, it seems to me to be clear that he came to his death through other causes than "external, violent, and accidental means within the intent and meaning" of the policy in suit; and I must so find.

Upon this ground, then, must be judgment for the defendant; and it is so ordered.

SUPREME COURT OF MISSISSIPPI.

Appeal from Circuit Court, Holmes County.

R. M. MURPHY, ADM'R, ETC.,)

vs.)

W. L. RED.*)

The holder of a policy of insurance on his own life, valid in its inception, may assign or dispose of the same as he may of any other chose in action, if there is nothing in the terms of the policy to prevent.

The assignee or purchaser of such policy, transferred according to its terms, is entitled to the proceeds of the same, notwithstanding he may have no insurable interest in the life insured.

W. L. Red took out a policy of insurance on his own life in the New York Life Insurance Company; payable to him or his legal representatives. After paying the premiums thereon for several years, W. L. Red assigned the policy, in writing, in conformity with its provisions, for value, to R. M. Murphy, who had no insurable interest in the life insured. Murphy paid the premiums on the policy until Red's death, and then collected the money due on the same. After this he died, and Mrs. Emma O. Red, widow and only heir of W. L. Red, brought this suit against appellant, his administrator, to recover the amount collected on the policy, and the judgment in the lower court was in her favor. The question controverted in the case is whether, under these circumstances, the sale and assignment of the policy was valid or not.

* Decision rendered, April 11, 1887.

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CALHOON & GREEN, *for Appellant.*

HOOVER & WILSON, *for Appellee.*

ARNOLD, J.

It is shown that the husband of appellee, before his death, assigned the policy on his life, for a valuable consideration, to appellant's intestate. It is not suggested that there was any purpose in procuring the policy to evade or circumvent the laws against wager-policies; but it is affirmed on the one side, and denied on the other, that the fact that the assignee had no insurable interest in the life insured vitiated the assignment, and the case will be considered in that aspect. It is generally agreed that mere wager-policies—that is to say, policies in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction—are void as against public policy: *Mutual Ins. Co. vs. Schaefer*, 94 U. S., 457. And it must be admitted that there are decisions and dicta to the effect that it is unlawful for the holder of a life insurance policy on his own life to sell or assign the same, under any circumstances, to one who has no insurable interest in the life insured. Courts which deny the validity of such sale or assignment, manifest great sensibility in regard to the danger which such transaction, if sanctioned, would cause to human life. They say that all the objections against issuing a policy directly to one, on the life of another in whose life the former has no insurable interest, exist against his holding such policy by mere purchase and assignment from another: that, in either case, the holder of such policy is interested in the death, rather than in the life, of the insured; and that the speculative or gambling element is the same, and the temptation to shorten the life of the insured is the same, in the one case as in the other.

The weight of reason and authority, we think, is against this view. There is an obvious difference between the two transactions. It is contrary to public policy for a person to insure a life in which he has no insurable interest, and to derive benefit or advantage therefrom. This is condemned as gaming or wagering on the chances of human life, and, as such, is prohibited by law. But it is lawful for one to insure his own life, and, after he has done so, the policy becomes his own, if payable as in this case, and there is no good reason why he may not sell or dispose of it as he may of any other chose in action, if the policy was valid in its inception: *Clark vs. Allen*, 11 R. I., 439; *St. John vs. American Mut. Life Ins. Co.*, 13 N. Y., 31; *Mutual Life Ins. Co. vs. Allen*, 138 Mass., 24; *Valton vs. Assurance*

Co., 20 N. Y., 32; *Olmsted vs. Keyes*, 85 N. Y., 593; *Ashley vs. Ashley*, 3 Sim., 149; *Currier vs. Continental Life Ins. Co.*, 52 Amer. Rep., 134, note; *Bussinger vs. Bank etc.* 30 N. W. Rep., 290.

A man may have the best of reasons for wishing to dispose of the policy on his life. The exigencies of business or absolute necessity may require him to do so. He may have paid large sums in premiums, and afterwards become unable to pay more, and if he is not allowed to sell or assign on the best terms he can make, the policy may be lapsed and lost. To impair the value and utility of his policy, or require him to lose it, on the ground that, if he were to sell or assign it, the assignee or purchaser would have a motive to kill him, or that any sale or assignment he might be able to effect with one who had no insurable interest in his life would be tainted with the vice of gambling, is, as matter of law, extremely fanciful and unsatisfactory.

Other interests and conditions generally prevalent, and involving tendencies quite as fatal to human life, may be created and are maintained without any such restriction. It seems that a life-tenant would be in about as much danger from the remainder-men, and a testator from a person having no interest in his life, for whom he had made provision by will, as the insured would be from the assignee or purchaser, without interest, of a life insurance policy. An insurable interest in the assured, at the time the policy is issued, is essential to the validity of the policy, but it has been often decided, as where a creditor takes out a policy on the life of his debtor, that it is not necessary to the continuance of the insurance that the interest in the life insured should continue. Cessation of interest, payment of the debt in the case supposed, would not terminate the policy: *Dalby vs. India Assurance Co.*, 15 C. B., 365; *Law vs. London Policy Co.*, 1 Kay & J., 223; *Connecticut Ins. Co. vs. Schaefer*, 94 U. S., 457; *Rawls vs. American Ins. Co.*, 27 N. Y., 282; *Provident Ins. Co. vs. Baum*, 29 Ind., 236; *Currier vs. Continental Ins. Co.*, 52 Amer. Rep., 134, note.

If the danger to life is not adequate to avoid the policy in such case, when the interest in the life insured ceases, it is not preceived why it should be deemed sufficient to invalidate a contract by which a policy is sold and assigned to one without interest. Besides, the protection should not be overlooked which is afforded to the life insured by the doctrine that one cannot recover insurance money payable on the death of a party whose life he has taken by felonious

means. It would be a reproach to the law of the land if he were allowed to do so. He could not in fact do so, any more than he could recover insurance money on a building which he had willfully set fire to and burned: *Mutual Life Ins. Co. vs. Armstrong*, 117 U. S., 591; 6 *Rup. Ct. Rep.*, 877.

In *Mutual Life Ins. Co. vs. Allen*, *supra*, the Supreme Court of Massachusetts, after removing all doubt as to the meaning of the decisions in that State on the subject and referring to the dicta in *Cammack vs. Lewis* (15 Wall., 634), and *Warnock vs. Davis* (104 U. S., 775), and *Franklin Ins. Co. vs. Hazzard* (41 Ind., 116), and showing that it was not decided in either of these cases that all assignments of life insurance policies, without interest, are illegal, said "that the right to receive money on the death of another is assignable at law or in equity will not be questioned. It is true that every person who is in expectation of property at the death of another has an interest in his death, but it does not follow, and it is not true, that the law does not allow the possession and assignment of such expectation. The objection applies with equal force to the assignment of a provision made for one upon the death of another by deed or will, as to the assignment of a like provision in the form of a life insurance. We see nothing in the contract of life insurance which will prevent the assured from selling his right under the contract for his own advantage, and the fact that the assignee has no insurable interest in the life insured is neither conclusive nor *prima facie* evidence that the transaction is illegal."

In the well-considered case of *Clark vs. Allen*, *supra*, the Supreme Court of Rhode Island used this language: "It is said that such an assignment, if permitted, may be used to circumvent the law. But it does not follow that such an assignment is not to be permitted at all, because, if permitted, it may be abused. Let the abuse, and not the *bona fide* use, be condemned and defeated. The truth is, it is one thing to say that a man may take insurance upon the life of another for no purpose except as a speculation or bet on his chances of life, and may repeat the act *ad libitum*, and quite another thing to say that he may purchase the policy as a matter of business, after it has once been duly issued under the sanction of law, and is therefore an existing chose in action or right of property. There is in such purchase, in our opinion, no immorality, and no imminent peril to human life. We should have strong reasons before we hold that a man shall not dispose of his own. Courts of justice, while they should uphold the great and universally recognized interests

of society, ought nevertheless to be cautious about making their notions of public policy the criterion of legality, lest, under the semblance of declaring the law, they in fact usurp the functions of legislation."

We are unable to subscribe to the doctrine that the assignor or purchaser of a life insurance policy, valid in its inception and transferred according to its terms, is not entitled to its proceeds, on the reason of his want of interest in the life insured.

The judgment is reversed, and judgment here for appellant.

SUPREME COURT OF ILLINOIS.

Appeal from Appellate Court, Third District.

BLOOMINGTON MUT. LIFE BENEFIT ASS'N

vs.

BLUE.*

A policy taken out by a beneficiary on the life of another in whom he has no interest in a wagering policy and void. But this doctrine does not apply where a party takes out a policy on his own life and pays the premiums, making it payable to another. This the law permits.

Where the charter of a benefit association states its purpose to be to furnish pecuniary benefits to devisees of members, a member may make the policy payable to a stranger in the first instance as well as by devise.

Where the company has accepted the premiums, and the conditions have been performed it cannot set up the doctrine of ultra vires to defeat a claim on the ground that the beneficiary was not a devisee as required by the charter.

CRAIG, J.

This was an action brought by William Blue against the Bloomington Mutual Life Benefit Association, to recover a certain amount of money claimed to be due on a life benefit certificate issued by the defendant in October 1883, to William R. Bailey, by which the association agreed, on consideration of certain payments to be made by Bailey, to pay to William Blue, upon the death of Bailey, an amount therein named. To the declaration on the certificate the defendant filed four special pleas. In the first it is averred that defendant is a corporation organized and doing business under an act of the legislature approved June the 18th, 1883, in force July 1,

* Opinion filed, March 23, 1887.

1883; that the plaintiff, Blue, is not a legatee or devisee of the said William R. Bailey, and is not related to the said Bailey either by affinity or consanguinity, etc.; that the defendant by virtue of the act under which it was organized and doing business, was only authorized to furnish life indemnity and pecuniary benefits to the widows, orphans, etc., of deceased members, by means whereof said life benefit certificate was and now is null and void. The second plea is like the first, and contains the following additional averments: "The object for which it is formed is to provide and equitably distribute, at minimum cost, a fund devoted to the relief of widows, orphans, heirs, and devisees of deceased members." It is also averred in this plea that Blue was not a creditor of Bailey, and had no pecuniary interest in his life, and had no well-founded expectation of pecuniary advantage to be derived from the continuance of the life of Bailey. This plea also contains a copy of the constitution and by-laws of defendant. In the third plea the statute and defendant's articles of incorporation are set up as a defense, and in the fourth plea the articles of incorporation, and the fact that Blue had no pecuniary interest in the continuance of the life of Bailey, are interposed as a defense. To the pleas the court sustained a general demurrer, and the defendant abiding by the pleas, judgment was rendered in favor of the plaintiff for the amount claimed.

It is contended: First, that Blue had no insurable interest in the life of Bailey, and hence the contract was void.

Second, that it is rendered void by virtue of the statute under which defendant is organized and doing business.

It may be regarded as a plain proposition of law that a wagering policy is void, and we think it also well settled that a policy taken out on the life of a third party by a beneficiary in the continuance of whose life the beneficiary has no pecuniary interest, may be regarded as a wagering policy, and as such would be void. Had this policy been taken out by Blue on the life of Bailey, without his knowledge or consent, and had the premiums been paid by him, it would manifestly fall within what is known as a wagering policy, and would be void. Public policy forbids one person, who has no interest in the continuance of the life of another, from speculating on that life, by procuring a policy of insurance. But here it does not appear that Blue had any instrumentality whatever in procuring the policy on the life of Bailey, or that he ever paid any portion of the premiums to procure the policy, or to keep it in force, and hence

the case of *Insurance Company vs. Hogan* (80 Ill., 39) cited by the defendant had no bearing on this case. In the case cited, the insurance was procured by the beneficiary, and all the premiums were paid by him; while here Bailey procured the policy, and paid all the premiums. Manifestly, the Hogan case can have no bearing on the facts of this case. Bailey had an insurable interest in his own life, and had a clear right to procure a policy on his life; and unless some principle of public policy is violated, he could make it payable, in case of death, to any person whom he might desire.

In *Lemon vs. Phoenix Mutual Life Ins. Co.* (38 Conn., 294), where a similar question arose, it is said: "A question was made before us that Miss Lemon had not an insurable interest in Mr. Peterson's life. If she had undertaken to obtain, and had herself obtained an insurance on his life, that question might have arisen; but surely Mr. Peterson had an insurable interest in his own life, and he obtained the insurance on it, and we know of no law to prevent him making it payable, in case of his death to the person to whom he was affianced; and if such a policy is delivered as a gift to the party to whom payable, we know of no law to prevent such a gift from being effectual. In *Rawls vs. Life Ins. Co.* (27 N. Y., 282) Judge Wright says: "If the contract is with the party whose life is insured, he may have the loss payable to his own representative, or to his assignee or appointee."

In *Fairchild vs. Northwestern Mut. Life Ass'n* (51 Vt., 613) it is said: "The second point made by defendant is that Fairchild had no insurable interest in the life of Mrs. Nay, and that the policy is therefore a wagering contract, and void by the law of the State. * * * If it were shown, therefore, that in point of fact Fairchild procured this policy to be issued upon the life of Mrs. Nay himself, and for his own benefit, the question of his insurable interest might arise. But the prima facie showing of the policy, application, and receipts is that Mrs. Nay procured the policy to be issued herself upon her own life, and chose to make Fairchild the beneficiary. * * * We are bound to presume that the policy was procured by Mrs. Nay upon her own life, as is the purpose of the instrument itself. * * * It cannot be questioned, says the Supreme Court of Indiana, "that a person has an insurable interest in his own life, and that he may effect such insurance, and appoint any one to receive the money, in case of his death, during the existence of the policy; and he may effectuate this object by an assignment of the policy, or by immediately appointing such person as the beneficiary.

* * * It is the interest of A in his own life that supports the policy. The plaintiff did not, by virtue of the clause declaring the policy to be for her benefit, become the assured. She is merely the person designated by the agreement of the parties to receive the proceeds of the policy upon the death of the assured."

In *Langdon vs. Union Mut. Life Ins. Co.* (14 Fed. Rep., 272) it is said: "There is no case, to my knowledge, which holds that a party may not insure his own life, and make the policy payable to any one he may select, though such person has no legal interest in his life. * * * Although this exact question has not been decided, the intimations of the courts are uniformly in that direction."

In *Connecticut Mut. Life Ins. Co. vs. Schaeffer* (94 U. S., 457) it is said: "There is no doubt that a man may effect an insurance on his own life for the benefit of a relative or a friend, or two or more persons on their joint lives for the benefit of the survivor or survivors. The old Tontines were based substantially on this principle, and their validity has never been called in question. The essential thing is that the policy should be obtained in good faith, and not for the purpose of speculating on the hazard of a life in which the assured has no interest." There are other authorities holding the same doctrine, but we have referred to enough to show the current of authority on the question.

The first section of the act under which the defendant is organized, in express terms authorizes the organization of such associations for the purpose of furnishing life indemnity or pecuniary benefits to devisees or legatees. If, as is plain from the language of the statute, a person may take out a policy on his own life, and devise such policy to a stranger, what principle of public policy would be violated by a provision in the policy making it payable to a stranger, in lieu of doing the same by will? If the policy may be made payable to a stranger, who has no insurable interest in the life of the insured as it may be by statute, we perceive no reason which will prevent the same thing being done by a clause the insured may have inserted in the policy at the time the insurance is procured. We have been cited to *Mutual Ben. Ass'n vs. Hoyt* (46 Mich., 473) as an authority holding that view, but we do not regard it in harmony with the current authority, and are not inclined to follow it. We think the better rule is, where a person obtains a policy on his life of his own accord, and pays the premium himself, he may, if he desires, make the policy payable to one who has no insurable interest in his life,

and by so doing no rule of law or principle of public policy will be violated.

We now come to the second question. Sec. 1 of the act under which defendant is incorporated is as follows: "Be it enacted by the people of the State of Illinois, represented in the General Assembly, that corporations, associations, or societies for the purpose of furnishing life indemnity or pecuniary benefit to the widows, orphans, heirs, or relatives by consanguinity or affinity, devisees or legatees, of deceased members, or accident or permanent disability indemnity to members thereof, and where members shall receive no money as profit, and where funds for the payment of such benefits shall be secured, in whole or in part, by assessment upon the surviving members, may be organized, subject to the conditions herein provided." It is contended that all persons not named in the act are prohibited from becoming beneficiaries. It will be observed that the contract involved is not absolutely prohibited by statute. All that can properly be claimed is that it was not expressly authorized by the statute. The defendant voluntarily issued the policy, it received the premium, and Bailey fully, so far as appears, performed all his contract required him to do. So far as he is concerned, the contract is an executed one. Now, upon the death of Bailey, when the defendant is called upon to perform its part of the contract, can it refuse, and defeat a recovery, by claiming that the contract is *ultra vires*? We think the law on this question is well settled that such a defense cannot be made availing. Where the contract has been fully performed by the party contracting with the corporation, and the corporation has received the benefits from such contract, it cannot invoke the the doctrine of *ultra vires* to defeat an action brought against it on such contract: 2 Mor. Corp., 689; *Bradley vs. Ballard*, 55 Ill., 415; *Darst vs. Gale*, 83 Ill., 136.

Judgment of appellate court affirmed.

SUPREME COURT OF INDIANA.

Appeal from the Ripley County Circuit Court.

CONTINENTAL INS. CO.

vs.

FREDERICK W. JACHNICHEN ET AL.*

Where arson is set up as a defense in a civil suit on an insurance policy, it is not necessary as in case of a criminal charge that the evidence must exclude all reasonable doubt. The rights of the parties in a civil action are to be determined by the preponderance of evidence.

Statement of the Case.

The defense in this action was that plaintiff had purposely destroyed the property to defraud the company. In the trial court an instruction was given to the effect that such defense, as it charged the plaintiff with having committed the crime of arson, must be proved beyond a reasonable doubt; and evidence was admitted, over the company's objection and exception, of the plaintiff's good moral character, and general good character for honesty "in the neighborhood in which he resides, and among the people with whom he resides, and among the people with whom he associates."

J. W. GORDON, J. O. CRAVENS and ADAM STOCKILGER, *for Appellant.*
JOHN G. BERKSHIRE and J. L. BENHAM, *for Appellee.*

MITCHELL, J.

Jachnichen sued the Continental Insurance Company upon a policy of insurance to recover the value of a barn and its contents

* Opinion filed, March 9, 1887.

which the complaint alleged were covered by the policy, and which were alleged to have been destroyed by a fire of unknown origin in September, 1884. Among other defenses the company answered that the assured had himself purposely burned the property with the intent to defraud the insurance company.

The plaintiff below recovered. The only question presented by the record which, in view of the defective condition of the bill of exceptions purporting to contain the evidence, can be examined on this appeal, involves the propriety of an instruction given by the court at the trial. In its fifth charge the court told the jury that in order to maintain the defense that the plaintiff had himself purposely destroyed the property for which he was seeking to recover with intent to defraud the company, the latter must establish the truth of such defense beyond a reasonable doubt. In support of the charge thus given, it is contended, in effect, that the defense relied on imputes to the plaintiff the crime of arson; that where a crime is thus specifically charged, whether it be in a civil or criminal action, the rule is applicable that, before the issue can be found against the party thus charged, the evidence must be of such weight and certainty as to exclude all reasonable doubt of the truth of the charge made. The question presented has been the subject of much discussion in the reported cases, as well as by writers upon the law relating to evidence. The statute regulating criminal procedure requires that, where there is a reasonable doubt of the defendant's guilt, he must be acquitted. The rule which demands greater certainty and weight of proof in criminal than is recognized in civil cases has its foundation in the tender regard in which the law holds the life and liberty of the subject. It had its origin, and was moulded into form and consistency when the penal code of England visited upon offenses of a comparatively trivial character the most harsh and cruel punishment. To mitigate the rigor of a code sometimes administered with severity, humane judges ingrafted upon the common law that no one should be convicted of a crime which affected life or liberty until his guilt was established with such a degree of certainty as to exclude every reasonable doubt. Having grown up out of the humanity of the law, the rule is very properly retained in criminal cases, even after the reasons for it have in good measure ceased to exist. Indeed, there is little of any rule whose origin, however remote, is found in the source whence this rule came, which should either be dissipated or obscured in the administration of the law. The consequences of a mistake where life and

liberty are involved are so overwhelming and irreparable that the integrity of the rule which requires a greater degree of certainty and caution in such a case, before coming to a conclusion, than in a case which affects property merely, should be steadily maintained and intelligently applied. This can only be done by limiting it to the class of cases which called it into being. To extend it is to render it obscure and dissipate its benign effect in the cases where its benefits should be fully realized. In some exceptional cases the doctrine that, where a criminal act is charged in a civil action the crimes imputed must be established beyond a reasonable doubt, has gained recognition,—notably in cases of libel and slander, when the defendant undertook to justify the uttering or publishing of that which amounted to a felony, and in cases where the action involved the burning of property under circumstances which amounted to arson. The rule was first extended to cases of libel and slander in England. The reason for the extension of the rule there was that if, upon the trial of a plea of justification of a charge which imputed a felony, the defendant proved the plea, the plaintiff was subject to be put upon trial for the felony proved, without the intervention of a grand jury. The verdict in such a case was equivalent to an indictment of the plaintiff: *Cook vs. Field*, 3 Esp., 133, 2 Hale, 150; 1 Chit. Crim. Law, 135; *Poulston vs. See*, 54 Mo., 291, 298; *Ellis vs. Buzzell*, 60 Me., 209. No such reason ever existed in this country for the application of the rule, and it may therefore be said it has been applied without any adequate reason. It may well be doubted whether its application can be supported upon principle, notwithstanding the precedents in its favor. In the case last cited, speaking of the rule as applicable to a case of slander, the Supreme Court of Maine say: "But we think it time to limit the application of a rule which was originally adopted in *favorum vitæ*, in days of a sanguinary penal code to cases arising on the criminal docket, and no longer to suffer it to obstruct or encumber the action of juries in civil suits sounding only in damages." Leaving the subject, so far as it relates to cases of slander and libel, for further examination when such a case arises, it is only proper to add here that the current of modern authority tends strongly in the direction indicated by the Supreme Court of Maine in *Ellis vs. Buzzell*, *supra*, 10 Am. Law Rev., 642.

In respect to other civil actions in which the commission of a crime is in issue, Campbell, J., disposed of the whole subject in the following terse declaration: There is no rule of evidence which re-

quires a greater preponderance of proof to authorize a verdict in one civil action than in another by reason of the peculiar questions involved. * * * There is no rule of law which adopts any sliding scale of belief in civil controversies:" *Elliott vs. Van Buren*, 33 Mich., 49. So, in the case of *Gordon vs. Parmelee* (15 Gray 413), Dewey, J., said: "It is better that the rule be uniform in all civil cases, leaving the instruction that the jury must be satisfied beyond a reasonable doubt to apply solely to criminal cases."

As a matter of course, when an infamous charge is preferred, whether it be in a civil or criminal case, the same presumptions of innocence attach in favor of the party assailed, and doubtless the jury should scrutinize the evidence with greater caution before coming to a conclusion in favor of guilt; but, as is said by a learned author, "in civil issues the result should follow the preponderance of evidence, even though the result imputes crime:" *Whart. Ev.*, sec. 1,246.

The rule that a preponderance of the evidence is all that is necessary to maintain the affirmative of an issue in a civil case is not vitiated by directing the attention of the jury to the nature of the issue, and to the presumption of innocence where a crime is charged; nor by reminding them that more evidence is required to create a preponderance, and establish guilt over such presumption than is required where no such presumption obtains. To create a preponderance, the evidence must overcome the opposing presumptions as well as the opposing evidence: *Decker vs. Somerset Ins. Co.*, 66 Me., 406; *Lyon vs. Fleahmann*, 34 Ohio St., 151. In proportion as the crime imputed is heinous and unnatural, the presumption of innocence grows stronger and more abiding, and until such presumption and all countervailing evidence are overborne with satisfactory evidence of guilt, it cannot be said there is a preponderance against the party accused. But the preponderance may outweigh the presumption of innocence, and all the evidence sustaining the presumption.

Some of the text-writers and several of the earlier reported cases approve the doctrine that where a criminal act is charged, even in a civil action other than slander or libel, the charge must be established beyond a reasonable doubt, before a recovery can be had by the party making the charge: 2 *Greenl. Ev.*, sec. 408; *Tayl. Ev.*, 97; *Bish. Mar. and Div.*, sec. 644; *Thurtell vs. Beaumont*, 8 E. C. L., 538; *Barton vs. Thompson*, 46 Iowa, 30; *Lexington Ins. Co. vs. Paver*, 16 Ohio, 342; *McConnell vs. Mut. Ins. Co.*, 18 Ill., 228;

Thayer vs. Boyle, 30 Me., 475; *Kane vs. Hibernia Ins. Co.*, 38 N. J., Law, 441. The more recent authorities are, however, decidedly adverse to this view. In the case of *Barton vs. Thompson*, *supra*, the rule applied by the learned judge below was distinctly sanctioned by the Supreme Court of Iowa. The same learned court, constrained by the weight of authority, expressly overruled *Barton vs. Thompson* in the more recent case of *Welch vs. Jugenheimer*, 56 Iowa, 11; 8 N. W. Rep., 673. So, also, the Supreme Court of New Jersey in *Kane vs. Hibernia Ins. Co.* (38 N. J. Law, 441), following the authority of *Greenleaf* and the libel and slander cases, adopted the rule contended for by the appellee. Upon an exhaustive review of the same subject the Court of Appeals in New Jersey overruled the former decisions in *Kane vs. Hibernia Ins. Co.*, 38 N. J. Law, 441. In this last case some of the judges undertook to maintain a distinction between cases such as this and cases of libel and slander, while others refused their assent to the attempted distinction, apparently favoring the abrogation of the rule in all civil cases. Indeed, so far as we have observed, all the courts which in some of the earlier cases applied the rule under consideration to civil actions, more latterly have receded from their former holdings in that regard: *Jones vs. Graves*, 26 Ohio St., 2; *Lyon vs. Fleahmann*, 34 Ohio St., 151; *Blaeser vs. Milwaukee Ins. Co.*, 37 Wis., 31; *Marshall vs. Thames Ins. Co.*, 43 Mo., 586; *Rothschild vs. American Ins. Co.*, 62 Mo., 356; *Schmidt vs. New York Ins. Co.*, 1 Gray, 529; *Bissell vs. Wert*, 35 Ind., 54; *Scott vs. Home Ins. Co.*, 1 Dill., 106; *Cooley, Torts*, 208; *May Ins.*, sec. 583.

It may therefore be considered as established that in civil actions of this class the right of the parties are to be determined by a preponderance of the evidence. Being a civil action, it is subject to all the rules which belong to actions of that class, without regard to the fact that the matter in issue may involve the imputation of a crime. This applies as well to the admissibility of evidence in respect to the character of the parties as to all the other distinctions between civil and criminal actions: *Welsch vs. Jugenheimer*, 56 Iowa, 11; 8 N. W. Rep., 673, and 41 Am. Rep., 77; *Barton vs. Thompson*, 56 Iowa, 571; 9 N. W. Rep., 899; 41 Am. Rep., 119; *Gebhart vs. Burkett*, 57 Ind., 378, and cases cited. Judgment reversed, with costs.

SUPREME COURT OF TEXAS.

Appeal from Harris County

NEW ORLEANS INS. CO.

vs.

H. O. GORDON.*

Previous to procuring the insurance, G., the owner insured, had conveyed property to K. in order to enable the latter to procure a loan from an association of which he was a member, for the benefit of G., the loan being to reconvey, and the association which could only loan to the insured consenting to the plan. The reconveyance was not executed after the fire. The policy provided that if the interest were other than the insured's, the policy was void. The reconveyance was not executed after the fire, unconditional, and sole ownership for the benefit of the insured must be stated or the policy would be void.

Held, That the conveyance was not such as to avoid the policy and the policy is to be stated.

The policy has been assigned by G. to K. as collateral security.

Held, That suit might be in the name of K., or of G. for the use

HUTCHESON, CARRINGTON & SEARS, *for Appellant*.

W. P. HAMBLIN, *for Appellee*.

WILL

H. O. Gordon brought this suit for the use of Theodor Keller against the appellant to recover \$700 for the loss by fire of a house insured by the latter; the policy having been assigned to Keller after the fire occurred. It seems that the policy was issued August 3, 1884, and contained, among others, the following provisions: "If the property be sold or transferred, or any change of place in the title or possession (except by succession by

* Decision rendered, March 15, 1887.

the death of the assured), whether by legal process or judicial decree or voluntary transfer or conveyance, this policy shall be void. * * * If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company, and so expressed in the written part of the policy; otherwise the policy shall be void." About three days previous to the issuance of the policy, viz., on July 31, 1884, Gordon had made to Keller a deed for the property insured, which deed was acknowledged and recorded on August 6, 1884, subsequent to the date of the policy. This deed was made for the purpose of enabling Gordon to obtain a loan of money for Keller from the Houston Homestead & Loan Association. Gordon could not do this directly, because he was not a shareholder in the company. Keller was; and the company, with knowledge of the purpose for which the deed was made, were willing to loan the money; but, upon examination, Gordon's title was found defective, and so the loan failed. Gordon, however, thought he might remedy the defects in his title, and so let the deed to Keller stand, so that, if he should succeed, the loan could be effected. The defects, however, had not been remedied up to the time of the fire, and hence the apparent title remained at that time in Keller, but he subsequently reconveyed to Gordon. There was evidence to show that Gordon was indebted to Keller at the time the deed was made, and there was some evidence to the effect that Keller expected to get some of the benefit of the money loaned to Gordon in payment of what the latter owed to Keller. Keller, however, says that the money was to go towards work done on the property conveyed, and that was what it was wanted for. Keller did not know whether Gordon would have given him any of the money or not. He supposed it was to pay him and the carpenters. Keller seems to have had no recollection as to having possession of the deed until he went with Gordon to the Homestead Association to procure the loan. When the policy was offered in evidence, it was objected to, because it had been fully assigned so as to place the legal title in Keller, and was not evidence of any right in Gordon to bring this suit, or to recover the insurance money. This objection was overruled by the court. Judgment was rendered for the plaintiff.

Upon the state of case made by the evidence, the defendant claims that the policy was avoided, whether the deed to Keller was made before or after the execution of the policy. It is very true that if the

deed conveyed any interest or ownership in the land, or burdened the title of Gordon with conditions within the meaning of the policy, it would be in violation of one or the other of the clauses of the policy which we have recited, and be violative of its provisions, no matter which of the two instruments was first in taking effect. The main argument of the appellant to support its position, that the deed did have this effect, rests upon the assumption that it was in the nature of a mortgage to secure an indebtedness of Gordon to Keller. . The evidence of Keller is to the contrary. He shows nothing but a mere hope or supposition that Gordon would pay him some of the money borrowed from the association. It will certainly not be necessary to produce argument or authority to prove that this was not a binding obligation, and created no lien upon the property. It is true that there was testimony tending to show that there was an undefined agreement between Gordon and Keller as to the latter's having some sort of claim upon the borrowed money, but it was too indefinite to create a lien. But, even if it would have created a lien, this testimony is in conflict with that of Keller, and we must give effect to the latter as being in support of the judgment. The judge did not make a record of his conclusions of law and fact, and we must treat the case as if he found in favor of the evidence which authorized the judgment rendered by him. As the loan was not effected, there was no mortgage of the property to the association, and the question of whether a mortgage or other lien upon the property would change the interest of Gordon therein, or incumber that interest with conditions within the meaning of the policy, is eliminated from the case.

The only matter to be considered is whether a mere deed, not intended by either party to convey title, and under which the grantee was to take no interest, effected any change in the ownership of the property. To state this proposition is to decide it in the negative. The most that can be said of it favorable to the appellant is that it put the apparent legal title in Keller; but to hold that this changed the ownership of the land, rendered it conditional, made it inure to the use or benefit of any person but Gordon, or transferred or conveyed the title to Keller within the meaning of the policy, is to give a technical construction to that instrument for the purpose of destroying the right of the assured. The rule is directly to the contrary. The language of the policy, being the language of the insurers, is to be construed most strongly against them, so as to give to the assured the indemnity for which he has bargained. When the

policy required entire and sole ownership, it must have meant an ownership in which no one else shared, and against which no one else could claim an interest. When it required that ownership to be unconditional it must have meant an ownership which depended upon the performance of no condition whatever. When it required that this should be for the use and benefit of the assured, it must have meant that the full equitable title should exist in the assured. When it required that the property should not be sold or transferred, or any change take place in the title or possession by conveyance, it certainly did not mean that a conveyance which did not transfer the title, or make any change in it whatever, should defeat the policy. Gordon's title after the deed was made was substantially, if not literally, such a one as was required by the policy. If his ownership after its execution was not as great as before, then the deed must have conveyed to the grantee some interest or right which he could assert to the property by reason of the deed, and yet no right of that kind existed, as was fully shown by the evidence. Keller could not have claimed any right whatever as against Gordon, either as plaintiff or defendant, in a suit with reference to the property.

"The object of providing against a transfer or change of title is to guard against a diminution in the strength of the motive which the insured may have to be vigilant in the care of his property:" *May, Ins. § 273.* Vigilance in the care of the property is not likely to be diminished when the assured is the only one who can possibly suffer by its destruction. "If there is no change in the fact of title, but only in the evidence of it, and if this latter is merely nominal, and not of a nature calculated to increase the motive to burn, or diminish the motive to guard the property from loss by fire, the policy is not violated:" *Ayres vs. Hartford Fire Ins. Co., 17 Iowa, 185.*

There is a vast difference between having a deed and having title to land. The former is evidence of the latter, but may exist without it; and here, while Keller had a deed for the property, the title remained in Gordon for all purposes, and especially for any purpose connected with its insurance against fire. Numerous authorities could be cited to sustain these positions, but it will not be necessary, as it is believed that none can be found to hold that such a conveyance changes the title. Those cases which hold that a deed not intended to convey title does pass any interest out of the grantor in violation of a policy such as the present are either cases where the deed was intended as a gift, a mortgage, or some similar instrument;

and even as to some of these there is a conflict of decision: *Western Mass. Ins. Co. vs. Riker*, 10 Mich., 279; *Savage vs. Insurance Co.*, 52 N. Y., 502; *Shepherd vs. Insurance Co.*, 38 N. H., 232. We think the entire interest in the property, and its full ownership as contemplated by the policy, remained in Gordon after delivery of the deed, and that it was not in violation of any of the provisions of the policy, and there was no error in the judgment in so declaring.

Nor was there error in overruling defendant's objections to the admission of the policy in evidence. The proof showed that it was transferred to Keller as collateral security for a debt due him from Gordon, and that the plaintiff, therefore, had an interest in its proceeds. While the suit might have been brought by Keller alone, yet, as was said in *East Texas F. Ins. Co. vs. Coffee* (61 Tex., 287), the equitable right of Gordon entitled him to be a party plaintiff in the cause. His suing for the use of the latter made him the real party plaintiff, and the judgment bound both him and Gordon, and the insurance company was fully protected.

There is no error in the judgment, and it is affirmed.

SUPREME COURT OF MASSACHUSETTS.

•
NATIONAL LIFE INS. CO. }

vs. }

PINGREY AND OTHERS.* }

A policy was issued on the life of P., payable to his mother. Subsequently, without the knowledge of the latter, it was surrendered, and a new one issued indorsed as a continuation of the first policy, and entitled to all its benefits, which was made payable to the wife of P. The original policy was always in the possession of P., but his mother was told of it and furnished him part of the money to pay the first premium.

Held. That the issues involved between the two beneficiaries as to their respective rights could not be tried under a bill of interpleader which assumes that the company is a mere stakeholder, for the claims are under two separate policies by issuing which the company has exposed itself to claims under both, and is therefore a party.

This was a bill in the nature of an interpleader. Hearing in the supreme court before W. Allen, J., who found the following facts:—

The plaintiff, on May 25, 1874, issued its policy of insurance upon the life of Franklin A. Pingrey, upon the application of said Franklin A. Pingrey, he being at the time 21 years of age. The policy was payable to his mother, the defendant Elizabeth H. Pingrey. On January 25, 1882, said Franklin A. Pingrey surrendered said policy to the plaintiff, who, at his request, issued to him another policy. This policy was payable to the defendant Cara L. Pingrey, the wife of said Franklin A. No new application for insurance was made by said Franklin A., but upon the surrender of the first policy for cancellation the second policy was issued, with the following indorsement upon it: "Original Pol. No. 9,372 was issued May 25, 1874, of which this is a continuation, and is entitled to all its benefits." Said Elizabeth H. Pingrey never consented to the surrender of the

* Decision rendered, March 31, 1886.

first policy. All the premiums on both policies were paid to Franklin A. Pingrey, the assured, when they came due; his mother said Elizabeth H. Pingrey, and his sister together furnished with all, or nearly all, the money necessary to pay the first on the first policy; but it did not appear how much of the for said premium was furnished by his mother and how his sister. It did not appear that any other sums besides premiums were paid upon either of said policies. Some taking out the first policy, said Franklin A. informed his that he had taken it out, but she never saw it until about time after the time of its issue, when one day he took it from where he had always kept it, as he was putting away other and, holding it up, folded, told her that it was the policy never read the policy, or knew its provisions, except that she stood from her son that he had taken out a policy for her. The insured always kept possession of said original policy surrendered it to the company to be canceled, as aforesaid, never delivered it to his mother. On February 26, 1880, insured married the defendant Cara L. Pingrey, and on September 30, 1882, he died without issue. At the time when the first was applied for, the assured, being then just 21 years of age, living at home, with his father and mother, with whom he came to live until his death; the family at that time consisting of father, mother, sister, and himself. His father was an investor so continued until his death, which was subsequent to the death of the assured, and the household expenses were paid principally by his mother, who took boarders. The assured paid no board May, 1876. From that time, until October, 1880, he paid twelve dollars per week to his mother, and after October, 1880, until his death he paid her eight dollars per week. From the time of his death on February 26, 1880, until his death, his wife lived with his parents, and assisted in the affairs of the house, and lived as a member of the family. The first policy was obtained, after consultation between the assured and the other members of the family, with intention of giving his mother the benefit thereof, he at the time being unmarried.

Upon these facts the presiding judge reserved the case for the determination of the full court.

PERRY & CREECH, for Plaintiff.

B. F. BROOKS and H. G. NICHOLS, for Defendants.

C. ALLEN, J.

The questions arising between the plaintiff and the different defendants cannot all be tried in an issue between the two defendants alone. The mother claims to be entitled under the first policy. The widow claims under the second policy. By issuing the two policies, the plaintiff has exposed itself to both of these claims, and must meet them as best it may. The difficulty of maintaining the bill of interpleader is not technical, but fundamental. In this form of proceeding, we cannot inquire whether the plaintiff has incurred a double liability. That result is possible. The plaintiff ought to be in a position to be heard upon the question; but on a bill of interpleader, which assumes that the plaintiff is merely a stakeholder, the plaintiff cannot be heard: *Haughton vs. Kendall*, 7 Allen, 72. A plaintiff cannot have an order that the defendants interplead, when one important question to be tried is whether by reason of his own act he is under a liability to each of them: *Cochrane vs. O'Brien*, 2 Jones & L., 380; *Desborough vs. Harris*, 5 De Gex., M. & G., 439; *Baker vs. Bank of Australasia*, 1 C. B. (N. S.), 515. See, also, Story, Eq. Pl. § 291 et seq.; Pom., Eq., § 1,320 et seq.

Bill dismissed.

SUPREME COURT OF INDIANA.

Appeal from Marion Superior Court.

NATIONAL BENEFIT ASS'N)

vs.)

WILLIAM BOWMAN.*)

The certificate in a benevolent association is a contract, and in case of accident the injury must be proved to be within its conditions in order to recover.

The certificate provided that no claim should be made for any injury while engaged in or in consequence of any criminal act. The defense was that the plaintiff was injured in a public highway while in a state of intoxication, which is a criminal act under the statute of Indiana.

Held, That the defense was bad on demurrer because it showed no causative connection between his condition and the injury.

SHEPARD & MARTINDALE, *for Appellant*.

C. S. DENNY & W. F. ELLIOT, *for Appellee*.

MITCHELL, J.

On the 3d day of September, 1881, William Bowman became a member of the National Benefit Association of Indianapolis. His certificate of membership contained a stipulation to the effect that if during the continuance of membership, he should sustain bodily injuries, effected through external, violent, and accidental means, which should, independently of all other causes, immediately and wholly disable him from the prosecution of any and every kind of business, then, upon satisfactory proof of such injuries, the association agreed to indemnify him against any loss, by paying him \$25.00 per week for such period of continuous total disability as should immediately

* Decision rendered, April 9, 1887.

follow, not exceeding fifty-two consecutive weeks. In a complaint to recover upon this certificate, the plaintiff alleged that on the tenth day of December, 1881, while pursuing his usual occupation as dairyman, he sustained bodily injuries through external, violent, and accidental means, by being accidentally thrown from his wagon, thereby suffering the dislocation of his shoulder and the breaking of the bone of his left arm, etc. He alleges that he was totally disabled therefrom, for fifty-two consecutive weeks. The complaint avers, among other things, that notice of the injury had been given according to the requirements of the certificate, and "that the plaintiff had performed all the conditions and terms of such certificate of membership on his part."

A copy of the certificate was made an exhibit to and filed with the complaint. Among other conditions, it contained the following: "No claim shall be made under this certificate, when the death or injury may have happened in consequence of any voluntary exposure to unnecessary danger, or while engaged in or in consequence of any criminal act." The appellant contends that the complaint does not state facts sufficient, because it does not aver that the injury complained of was not the result of voluntary exposure to unnecessary danger, nor that it was not sustained while engaged in, or in consequence of, any criminal act.

We concur in the view urged by counsel that the certificate upon which the suit is founded is a contract, and that it is essential to a recovery thereon that the plaintiff must have averred and proved that the injury complained of was sustained within its limits and conditions. According to the terms of the certificate, it was a condition that the plaintiff should make no claim for indemnity for an injury which might happen to him in consequence of voluntary exposure to unnecessary danger, or while engaged in, or in consequence of any criminal act. To have made proof of and preferred a claim for indemnity, for an injury sustained within the prohibition of the certificate, would have been a plain violation of its terms. When, therefore, the plaintiff set forth the circumstances under which he sustained the injury and that he had presented proof of such injury according to the requirements of the certificate, and that he had "performed all the conditions and terms of such certificate of membership on his part," he thereby effectually negatived the idea that he had violated any of the conditions precedent contained in the certificate, or that the injury had occurred outside the limits of the risk. Section 370 of the code provides that "in pleading the per-

formance of a condition precedent in a contract, it shall be sufficient to allege, generally, that the party performed all the conditions on his part." The complaint fulfilled all the requirements of good pleading under the code: *National Ben. Ass'n vs. Grauman*, 107 Ind., 288; *Bertelson vs. Bower*, 81 Ind., 512; *Home Ins. Co. vs. Duke*, 43 Ind., 418; *Lowry vs. McGee*, 52 Ind., 107.

The fourth paragraph of defendant's answer, to which a demurrer was sustained, set up the last clause of the condition in the certificate above set out; and averred that, previous to and at the time of the accident through which the plaintiff was injured, he was in a public highway, in a public place, in a state of intoxication, and that, by the statute of the State of Indiana, it is made a criminal act to be found in a public place in a state of intoxication.

The conclusion is drawn by the pleader upon the foregoing statement, that the injury to the plaintiff happened while he was engaged in, and in consequence of, a criminal act. The conclusion does not logically nor necessarily follow from the facts stated.

The occasion may have been such at the time of the accident that the plaintiff would have been thrown from his wagon whether intoxicated or not. It is not shown how the fact of intoxication contributed to the accident or injury. There must have been, as was said by this court in *Bloom vs. Franklin Life Ins. Co.* (97 Ind., 478-484), "some causative connection between the act which constituted the violation of law" and the injury of the plaintiff. The answer was clearly insufficient. Judgment affirmed, with costs.

SUPREME COURT OF NEBRASKA.

Error to Platte County.

WESTERN HORSE & CATTLE INS. CO. }

vs. }

O'NEILL.* }

One O'Neill insured a mare for the sum of \$100 in the Western Horse & Cattle Insurance Company, and afterwards violently beat and abused said mare by striking her with an iron rod. *Held*, that a preponderance of the testimony clearly established the fact that the death of said mare was the result of such striking and abuse, and that O'Neill was not entitled to recover the amount of the insurance for the death of said mare.

*HIGGINS & GARLOW and CHARLES OGDEN, for Plaintiff.**MCALLISTER BROS., for Defendant.*

MAXWELL, C. J.

This is an action brought upon an insurance policy on one bay gelding six years old, and one bay mare eight years old, it being alleged said gelding died from disease, April 18, 1885; and said mare died from disease, May 13, 1885. The defendant, in answer, admits insuring the property, but alleges "that said bay gelding died by reason of abuse of plaintiff, and for want of proper and reasonable care, and defendant denies that said policy was in force at the time of the death of the said mare, but alleges that said policy contained a condition that the defendant corporation reserved the right to cancel said policy at any time, by giving notice to that effect to the policy-holder, and returning to him the amount of unearned premium; and that, in pursuance of said condition, said defendant,

* Decision rendered, April 6, 1887.

did, on the ninth day of May, 1885, cancel said policy in accordance with said condition. And defendant further alleges that said last-named animal died by reason of the abuse of said plaintiff, and for want of proper and reasonable care." In reply, the plaintiff admits that said policy of insurance contains a provision therein as stated in defendant's answer, viz., that said defendant corporation reserve the right to cancel said policy of insurance at any time by giving notice to that effect to the policy-holder, and returning to him the unearned premium, but denies that said defendant canceled said policy in manner and form as stated in their answer; also denies all other new matter contained in said answer as a defense. On the trial of the cause the jury returned a verdict in favor of O'Neill for \$227, and judgment was rendered thereon. The gelding was insured for \$115, and the mare for the sum of \$100.

After a pretty careful examination of the testimony, we think the insurance company has failed to establish any defense against the payment of the insurance on the gelding, as there is no proof that such gelding died from the fault of O'Neill.

In regard to the mare, however, we think the company has established a complete defense against the payment of the insurance on her.

One W. M. Abbott testifies as follows: "I reside in Humphrey, Platte County. Have lived there for two years. Am acquainted with Thomas O'Neill. Was acquainted with him last spring. I saw Mr. O'Neill in Humphrey in the early part of the month of April last year [1885], when he came to take a calf from my house. Had a conversation with him. Mr. O'Neill stated in my presence that the animal he whipped was one covered by this insurance. It was after he had commenced this action. It was in Humphrey. He took an iron rod out of the wagon, and whipped her with it. I thought at the time it was an end-gate rod. He whipped her very hard, knocked her down several times with the rod, and beat her bad. He struck her pretty near all over with the rod. He bent the rod several times by beating her, and then would straighten it out again. He beat her over the head, and over the sides and back. She looked pretty hard when he was through beating her. She had been badly whipped. There were ridges on her. She was swelled up in places and the blood run from her nostrils. Cannot say how long this beating continued; should think something like half an hour. When the animal was down, he kept on pounding. There were several of the citizens came around and interfered, and caused him to desist.

It caused quite a crowd to come around. Several tried to stop him. I think he told one man that it was his horse, and he would whip it as long as he pleased, and if he didn't get away he would whip him. He had an iron rod in his hand at the time,—a rod about the size of an end-gate rod. I thought it was the end-gate rod, and think so yet. About every time he would hit her she would grunt. I think Mr. Bloedorn came up, and caused him to desist beating her. When he stopped beating, I think she was lying down. She did not lie long. He was beating her over the head when she fell. I think her method of going down indicated that she was knocked down. Cross-Examination. I think it was the mare that he whipped; a bay mare, very thin in flesh. I do not think she fell over the tongue. She would not often rear up but when he struck her over the head. A balky horse sometimes throws himself. Redirect. Question. State what statements Mr. O'Neill made to you when you say he talked to you in the saloon. Answer. He said, if they would pay him for the other horse that died, he would not sue for the mare that was whipped. Mr. O'Neill spoke of this mare as having died. He told me she was dead after he commenced this action. I didn't think she would live to get home."

There is a large amount of other testimony corroborating that of Mr. Abbott, and a clear preponderance of the testimony establishes the fact that the mare died as a result of the beating. O'Neill, therefore, cannot take advantage of his own wrong, and is not entitled to recover for the loss of the mare.

The insurance company attempted to cancel the policy in question on the ninth day of May, 1885, after the death of the horse, but before the death of the mare. There is a conflict in the testimony as to the time such cancellation actually took place; but in the view that we take of the case, it is immaterial whether it was canceled before the death of the mare or afterwards.

The judgment for the amount of insurance on the mare is reversed, and for the insurance on the horse is affirmed, and judgment will be entered in this court in conformity to this opinion. Judgment accordingly. The other judges concur.

SUPREME COURT OF MISSOURI

GIDDINGS

vs.

PHENIX INSURANCE COMPANY.*)

It was alleged in the petition that a previous policy on the property was issued and twice renewed by the agent who agreed with the claimant that he would keep it renewed from year to year, that the claimant should have time to pay the premiums at his convenience, that the agent informed him that the policy sued on had been renewed, and would not be affected if renewal certificates were not delivered prior to a loss. The answer set up that no renewal contract had been made, that no premium was paid without which the policy stipulated that it could not be renewed, and that the agent informed the claimant that he was not authorized to renew without payment of premium.

Held, That the burden of proof was on the claimant and the question was for the jury.

An allegation of improper evidence will not be considered on appeal when not assigned as a reason for granting a motion for a new trial.

NORTON, J.

This is an action to recover \$350 for the loss of a house by fire, alleged to have been insured by defendant. It is substantially alleged in the petition that defendant, by its agent Bryan, issued its policy to plaintiff, dated December 8, 1877, insuring said house for the period of one year; that on the eighth February, 1879, said policy was continued, by renewal, for one year, and in 1880 for one year more; "that it was agreed between plaintiff and Bryan, defendant's agent, that said policy should not expire; that said Bryan should keep the same continued by renewal from year to year; and

* Decision rendered, December 6, 1886.

also agreed that plaintiff should have time to pay premiums, and pay the same at his convenience; that plaintiff was informed by defendant's agent that his policy commencing in 1881, for one year, had been renewed, and that it would not affect his policy if certificates of renewal were not delivered before any accident by the burning of the property insured; that on the nineteenth of September, 1881, the house was destroyed by fire, of which due notice was given, but defendant refused to adjust and pay the loss.

Defendant in its answer, after denying the averments of the petition, sets up that the policy mentioned in the petition expired on the eighth of February, 1881, and that plaintiff neither made, nor attempted to make, any contract or agreement whatever for the renewal of said policy on the said eighth of February, or at any other time, and that plaintiff has not at any time paid, or offered to pay, any money for the renewal of said policy; that the policy specifies that it can only be renewed by payment of the premium, and that the plaintiff was informed by defendant's agent that he was not authorized to renew said policy without the payment of the premium therefor on such renewal.

On the trial, judgment was rendered in favor of the defendant, from which the plaintiff has appealed, and assigns for error the action of the court in giving and refusing instructions. It is sufficient to say, of the instructions that were given, that it clearly appears from them that the court tried the case on the theory that all contracts and negotiations between plaintiff and defendant's agent, as to the terms and contract of insurance of the property in question, and the renewal thereof, had or made before or at the time of the issuing of the policy, must be considered as merged in the written policy; and that unless defendant did, by its agent, renew said policy, and thus continue it in force till the eighth of February, 1881, and did, by its agent, within one year before the eighth February, 1881, or after that time, and before the loss occurred, agree with plaintiff to renew said policy for another year from the eighth February, 1881, the jury should find for the defendant; and that if they believed that such agreement, as above set forth, was made, they should find for the plaintiff. The instructions that were given embraced this theory of the case, and the question as to whether or not such agreement upon which plaintiff's right to recover rests, was fairly submitted to the jury. The evidence on this question was conflicting, and whether it preponderated for or against the plaintiff was for the jury, and not for us, to decide. We have

been cited to a large number of authorities by counsel on both sides, and, without entering into a critical analysis of them, it is sufficient to say that many of them have no application to the case at bar, and those of them that are applicable sustain the theory on which the case was tried.

The point made that the court admitted improper evidence cannot be considered, because in the motion for new trial no such ground was assigned as a reason for granting the motion.

Judgment affirmed, in which all concur.

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REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

UNITED STATES CIRCUIT COURT.

WESTERN DISTRICT OF WISCONSIN.

FRIEZEN

vs.

ALLEMANIA FIRE INS. CO.*

A policy of fire insurance provided that an action to recover upon the policy for a loss should be commenced within six months after the fire occurred, and also that arbitrators should be appointed to ascertain the amount of loss, and no action should be brought until they had made an award, and nothing should be due and payable under the policy until sixty days after the completion of all the requirements of the policy. *Held*, These provisions should all be construed together, and the six-months limitation be

* From *Federal Reporter*.

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reckoned, not from the occurrence of the fire, but from the expiration of the sixty days, when the loss was due and payable. Under any other construction the insured's right of action might be barred before it had accrued.

The policy also provided that "the interest of the insured is the entire, unconditional, and sole ownership of the property, and that the policy shall become void by the sale or transfer, or any change in title or possession, of the property insured, whether by legal process or judicial decree, or voluntary transfer or conveyance," etc. At the time the policy was issued there was an outstanding mortgage on the property, and the insured, after receiving the policy, executed another mortgage upon it. *Held*, neither of these mortgages was a voluntary sale, transfer, or conveyance of the property within the meaning of the policy, nor did either have the effect to vitiate the policy; especially as the insured was asked no questions as to any outstanding mortgage, and made no agreement as to future ones.

H. W. CHYNOWETH, *for Plaintiff*.

STEVENS & MORRIS, *for Defendant*.

BUNN, J.

This is an action brought to recover a loss under a policy of insurance against fire issued by the defendant company to one C. Friezen, and afterwards duly assigned to the plaintiff. A jury was waived by the parties in writing, and the case tried before the court. The facts are stipulated, and are as follows: The insurance company have had an agent in Wisconsin, located at Milwaukee, since 1880. The policy was duly issued by the defendant company on April 8, 1885, by which they insured the said C. Friezen against loss by fire upon his two-story, frame hotel building and addition, situate in Glyndon, Minnesota, and the furniture therein, in the sum of \$1,200. Eight hundred dollars of this was upon the building, and four hundred upon the furniture therein, beds, bedding, etc. On June 23, 1885, the building and furniture insured were accidentally and by misfortune totally destroyed by fire. The insured, immediately upon the happening of the fire, gave notice thereof to the company, and as soon as possible, to wit, on thirty-first July, made and rendered to the defendant proofs of the loss, amounting to \$1,098.30. The plaintiff, upon assignment of the policy and cause of action to her, demanded payment, but the company declined to pay. On the tenth of September, 1885, the defendant company, through its agent at Chicago, demanded of the insured that he submit to an examination under oath touching the loss, and insisted that the company had the right to have such examination take place at their office at Pittsburgh, Pennsylvania, but offered to allow the insured to be examined at their office in Chicago. The insured offered to submit to examination at his home in Glyndon, or at any point in Minnesota at a reasonable distance from his home. They

could not agree upon the place for examination, and afterwards, in February, there was some move to arbitrate the question; the insured offering and demanding that it be arbitrated, and setting a day for such purpose, and notifying the defendant company. But no arbitration or examination was ever had. There was a chattel mortgage for \$1,100 executed by the assured on March 18, 1885, upon the furniture of the hotel, and which was still subsisting at the time the policy was issued; and after the issuance of the policy, on June 17, 1885, Friezen executed a second mortgage upon a portion of the property, to wit, the pool-table and some other articles of saloon furniture, to secure the sum of \$115. There was no delivery or change of possession of the property under either mortgage, and nothing to show when either of them was to become due.

The defendant makes three defenses to the action: (1) That the court has no jurisdiction of the subject-matter of the action, or of the defendant corporation; (2) that the action is barred by the six-months limitation provided for in the policy for bringing the action; (3) that the plaintiff is barred from recovering on account of the two mortgages upon the personal property on which \$400 of the insurance was placed.

This case was before the court on a former occasion upon demurrer, when the same questions as to jurisdiction of the court were relied upon and decided, and it was then held that, as the action was transitory in its nature, it was not necessary to bring suit in Minnesota, where the property was situate; and that, as the summons was served upon the company's agent in Wisconsin, and the company, by its attorneys, had put in a general appearance in the action, and taken steps to remove the case into this court, that the court had acquired jurisdiction of the case and of the person of the defendant. I see no reason for changing the ruling then made. See ante, 349.

Bearing upon the other defenses above named, are the following provisions in the printed portions of the policy:—

(1) The assured hereby covenants and agrees that any application, plan, survey, or description referred to in this policy is true, and shall be and form part of this policy, and a warranty by the assured that no fact material to the risk, or relating to its condition, situation, or occupancy, has been concealed nor misrepresented, and that the interest of the assured therein has been truly stated to this company; it being understood, unless otherwise expressed in this policy, that the interest of the assured is the entire, unconditional, and sole ownership of the property, and that all buildings intended to be insured by this policy stand on ground owned in fee-simple by the assured.

This policy shall become void and of no effect by the sale or transfer, or any change in title or possession, of the property insured, whether by legal process or judicial decree, or voluntary transfer or conveyance.

The amount of sound value and of the loss or damage shall be determined by agreement between the company and the assured; but if at any time differences shall arise as to the amount of any loss or damage, or as to any question, matter, or thing (except the validity of the contract, or the liability of the company), concerning or arising out of this insurance, every such difference shall, at the request of either party, be submitted, at equal expense of the parties, to competent and impartial persons, one to be chosen by each party, and the two so chosen shall select an umpire to act with them in case of their disagreement; and, until such an appraisement is held the loss shall not be payable, and the award in writing of any two of them shall be binding and conclusive as to the amount of such loss or damage, or as to any question, matter, or thing so submitted.

The assured shall, whenever required, submit to examinations under oath by any person appointed by this company, and subscribe to such examination when reduced to writing, and shall also, as often as required, produce their books of account and other vouchers, or certified copies thereof, and exhibit the same for examination at the office of this company, in the city of Pittsburgh, and permit extracts and copies thereof to be made.

As soon after the fire as possible, proofs of loss, being a particular statement of the loss, shall be rendered to the company, signed and sworn to by the assured, stating such knowledge or information as the assured has been able to obtain as to the origin and circumstances of the fire, and also stating the title, and all other insurance covering any of the property, and the copy of the written parts of all policies, and the occupation of the entire premises. The assured shall also furnish such further particulars, and such certificates of a magistrate or officer charged with the duty of investigating fires, as may be required. And if loss or damage be claimed upon buildings, fixtures, or machinery, the assured shall, if required, furnish plans and specifications thereof, which shall form a part of the particular statement or proof of loss. The claim shall not be due and payable until sixty days after the full completion of all the requirements herein contained.

It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner therein provided, and after proofs of loss have been rendered in due form to the company, nor unless such suit or action shall be commenced within six months next after the fire has occurred.

1. Is the action barred by the six-months limitation in the policy? The loss occurred on June 23, 1885. Proofs of loss were made and rendered to the company July 31, 1885. By the provisions of the policy the loss was not payable until sixty days after proof of loss, or until September 30, 1885. The summons was served on February 24, 1886, and a general appearance in the action made by the com-

pany on March 2d following, so that, if the six-months limitation commenced to run from the day of the fire, the action is barred. If from the time when the action might have been commenced, which was sixty days after proofs of loss, or September 30th, then the action was brought in time.

It is evident a literal construction of the six-months clause, standing apart from the other provisions of the policy, would bar the action. But I am of opinion that all the provisions should be considered together; and, if possible, such a reasonable construction given them as will give proper effect to each part, because it should not be considered that it was in the contemplation of the parties that any one of these several provisions should be inoperative. Now, if a literal construction shall be given to the six-months clause, what will be the effect? Here are various provisions bearing materially on the question of time,—that allowing examination under oath, and the production of books and vouchers, and more especially the provisions respecting arbitrators, and the one giving sixty days in which to pay after all these things have taken place, and the amount of loss fixed by an award. An arbitration is like a law-suit in this, at least, that it takes time. Arbitrators must be agreed upon who will take upon themselves the duties of investigating the facts, and making a just award; witnesses must be had; adjournments and continuances must have been contemplated,—for these are among the usual incidents to an arbitration. So that it is easy to see, considering what the parties must have had in view, without fault on the part of either, and using all the diligence in their power, four months might very well be taken in arbitrating the question of loss and all the other questions between them before a final award could be reached. Then no action would lie until sixty days more had elapsed, when the six months from the time of the fire would be gone, and assured's right of action gone with it, if a literal construction is to be given to this provision. Would not such a construction defeat the provision itself, because a reasonable time must be given for the assured to assert his right? It is not in the power of the parties to give a right of action in case of a loss, and at the same time provide that there shall be no reasonable time in which to assert it.

It will be seen that, under such a construction, four months is the utmost time the assured would have in which to bring his action, allowing that no time at all were taken for making proofs of loss, for examination under oath, and for arbitration. This would seem

like a rather short time, and, if it were yet an open question, it might be well to consider how far the limitation provided by law, which in this case would be six years, may be shortened and shrunk by the greed of one or other of the contracting parties. But the law is settled that it is competent for the parties to agree upon a time shorter than that allowed by law, provided some reasonable time is given in which the party may assert his right in court.

In *Riddlesbarger vs. Hartford Ins. Co.* (7 Wall., 386) the limitation was twelve months, and the court sustained it: In *McFarland vs. Peabody Ins. Co.* (6 W. Va., 427) the provision was six months, and the money due ninety days after proof of loss made. The company offered to prove that the suit was begun (as the fact was) more than six months after the ninety days had expired, when the debt became due. The court held the provision binding.

There are many other cases where a twelve-months and six-months limitation have been sustained; but in all cases I have been able to find, excepting two, where the question has been raised, the six months or twelve months have been held to run from the time the cause of action accrues, and not from the time of the loss. Such a construction seems to be unavoidable in order to give the assured any reasonable time after the debt becomes due in which to bring his action.

The company having secured itself against action brought for sixty days after the amount of loss is fixed by arbitration, it could hardly have been within the contemplation of the parties that this same sixty days, during which the remedy is suspended, should constitute a part of the six months which the assured is to have in which to bring his action. Indeed, there is no legal liability until the sixty days have expired, and certainly there could be no great propriety in providing for a time for bringing the action which should cover a period when there was no legal liability on the part of the company to be sued. It would be something more than absurd to give the insured six months in which to bring action, and at the same time provide that a large part or the whole of the time so given should be taken up by a period when there is no legal liability, and no action can be brought. It would savor to much of cutting off the remedy entirely. Such a construction would make the different provisions as to time wholly inconsistent with one another. It is, I think, more rational to say, considering these provisions as to time all together, that what the parties contemplated was that, after the

loss became due and payable, the assured should have six months within any part of which time he might bring his suit. Such a construction preserves the rights and remedies of the parties, and does justice to both; while the other construction might in many cases, without any fault on the part of the assured, cut off his remedy by giving him no time, or an unreasonably short one, in which to assert it, which the law would not allow, as being against public policy. The language of these provisions is that of the company; and, if there is any uncertainty about the meaning, it should be construed most strongly against the party using it, and in favor of the assured as he might be reasonably presumed to have understood it. See the following leading cases, where the same construction has been placed upon similar provisions: *Barber vs. Fire & Marine Ins. Co. of Wheeling*, 16 W. Va., 658; *Chandler vs. St. Paul Fire & Marine Ins. Co.*, 21 Minn., 85; *Steen vs. Niagara Fire Ins. Co.*, 89 N. Y., 315; *Spare vs. Home Mut. Ins. Co.*, 17 Fed. Rep., 568; *Hay vs. Star Fire Ins. Co.*, 77 N. Y., 235; *Mayor of New York vs. Hamilton Fire Ins. Co.*, 39 N. Y., 45; *Ellis vs. Council Bluffs Ins. Co.*, 64 Iowa, 507, 20 N. W. Rep., 782; *Longhurst vs. Star Ins. Co.*, 19 Iowa, 364; *Hennessey vs. Manhattan Fire Ins. Co.*, 28 Hun, 98.

We have been referred by the defendant's counsel to a manuscript opinion by Judge McAllister in the appellate court for the first Illinois district, in the case of *Allemania Ins. Co. vs. Little*, in an action upon a policy like the one in suit, and issued by the same company, where a different ruling was had, though this precise question does not seem to have been presented. In that case the fire occurred on August 23d. The action was begun February 24th following, six months and one day after the fire. The trial court was asked by the defendant company to instruct the jury that if they believed from the evidence that the property was destroyed by fire, and that such fire occurred on the twenty-third day of August, and that suit was not commenced until the twenty-fourth of February, then the plaintiff could not recover. This instruction the court refused to give as asked, but modified it, by telling the jury that what the facts were as to when the fire occurred, and when the property was destroyed, must be determined by the jury by a consideration of all the evidence in the case. A verdict being found for the plaintiff, the appellate court reversed the case, holding that the instruction asked by the defendant should have been given; that the six months began to run from the day the fire first occurred, August 23d, and that there was no question to submit to the jury as

to when the property was destroyed, and that the instruction given on that question was erroneous. Probably the reason why the question in the case at bar was not presented to the court, and decided in the case of *Little*, was that the Supreme Court of Illinois, in the case of *Johnson vs. Humboldt Ins. Co.* (91 Ill., 92), had already decided the same question adversely to the construction now contended for by the assured, which decision was binding on the appellate court. That case and the case of *Fullam vs. New York Union Ins. Co.* (7 Gray, 61) are the only ones I have been able to find, though there may be others, which hold that the clause limiting the time for bringing the action should receive a literal construction according to its plain meaning standing alone, and without reference to the other provisions bearing on the question of time. They are both expressly disapproved by the New York Court of Appeals in *Steen vs. Niagara Fire Ins. Co.*, 89 N. Y., 315. And the Illinois case is disapproved in *Barber vs. Fire & Marine Ins. Co.*, 16 W. Va., 658. The court in each of those cases appear to have followed the usual rule of interpretation that a provision of a written instrument is to be construed according to the natural and plain meaning of the words, without reference to another qualifying rule that where there are different clauses which, according to such rule of interpretation, would be in conflict with each other, they should all be construed together, and such a construction given them, if possible, as will give proper effect to each part, without doing violence to either.

2. Was the policy made void by the mortgages upon the personal property, one executed before and the other after the risk was taken? It seems quite evident, as was said by the court in *Commercial Ins. Co. vs. Spankneble* (52 Ill., 53), that a party claiming such a forfeiture is *stricti juris*, and must bring himself strictly within the clause of forfeiture to defeat the right. These various provisions in the policy bristling with conditions intended to hedge the right of the underwriters, and contained in the printed portion of the policy, are put there by the company, and for its benefit, before any contract of insurance is made. If there is any ambiguity in the language so as to render it capable of two constructions, that should be adopted which will give effect to the policy, and carry out the intention of the parties, because it must be considered, in the absence of fraud, to have been within the contemplation of the parties when the insurance company has issued its policy, and accepted the premium, that in case of a loss the company is to pay, unless there has been

some clear and manifest breach of the conditions on the part of the insured which works a forfeiture of his right.

Now, the language of the policy in regard to title is that "the interest of the assured is the entire, unconditional, and sole ownership of the property, and that the policy shall become void by the sale or transfer, or any change in title or possession of the property insured, whether by legal process or judicial decree, or voluntary transfer or conveyance." Was the mortgagor the entire and sole owner of the property within the meaning of the first clause, when the policy was issued, or does the subsequent mortgage constitute a voluntary sale, transfer, or conveyance of the property, the mortgage not being foreclosed, nor the possession of the assured disturbed? I think both branches of this inquiry must be answered in favor of the insured. A mortgage, unaccompanied by any change in the possession, is not a sale, transfer, or alienation within the ordinary acceptance of these terms. The mortgagor is still the owner. A mortgage is an incumbrance upon the property created for the purpose of securing the payment of money, but it is not a sale or alienation within the usually accepted meaning of those words. The mortgagor still retains the exclusive possession and the general right of property, and has the same insurable interest that he had before the mortgage was executed, as, if the property burns, his debt remains unpaid, and the entire loss falls on him. It does not appear any questions were asked the insured in regard to incumbrances upon the property; and, if it had been intended that he should guaranty that the property was free from incumbrance, and that no incumbrance should in future be put upon it, it would have been an easy matter to have used language to convey such a meaning clearly. As nothing is said of mortgages, and the language used does not necessarily or fairly include mortgages, it must be presumed that the parties did not intend to provide against them.

If a mortgage constitutes an alteration or change in title, it is not such a one as is specified in the policy. It is not a sale or transfer, either by legal process or judicial decree, or by voluntary transfer or conveyance. The terms "entire and sole ownership," as used in the policy, is calculated to distinguish the ownership which the assured must have from that of a part ownership, which the policy would not allow. Nor is the interest of the mortgagor other than unconditional, as is that of a pledgee or mortgagee, which is conditional. Of course, if the debt is not paid, the mortgagee may seize and sell the property; but so it might also be seized and sold on attach-

ment or execution, which sale in either case would come within the conditions of this provision. It was lately ruled in the eighth circuit, in the case of *Waller vs. Northern Assur. Co.* (10 Fed. Rep., 232), under a similar clause, where the interest of the assured was that of a mortgagee in possession instead of being the general owner, that a failure to disclose that fact rendered the policy void. The interest of the assured was a conditional one, and he was not the owner, whereas he had stipulated that his interest was unconditional, and that he was the sole owner.

It seems to me clear upon principle, and I think the adjudged cases quite uniform in holding, that either a chattel or real-estate mortgage executed before or after the policy is issued, does not come within such a provision as that contained in the policy. I refer to a few of the leading cases: *Kronk vs. Birmingham Ins. Co.*, 91 Pa. St., 300; *Judge vs. Connecticut Ins. Co.*, 132 Mass., 521; *Carson vs. Jersey City Ins. Co.*, 39 Amer. Rep., 584; *Commercial Ins. Co. vs. Spankneble*, 52 Ill., 53; *Hartford Ins. Co. vs. Walsh*, 54 Ill., 164; *Aurora Fire Ins. Co. vs. Eddy*, 55 Ill., 213; *Loy vs. Home Ins. Co.*, 24 Minn., 315; *Smith vs. Monmouth Ins. Co.*, 50 Me., 96; *Shepherd vs. Union Mut. Ins. Co.*, 38 N. H., 232; *Byers vs. Insurance Co.*, 35 Ohio St., 606; *Van Deusen vs. Charter Oak Ins. Co.*, 1 Rob. (N. Y.), 55.

The plaintiff is entitled to a judgment for the sum of \$1,098.30, with interest at 7 per cent from September 30, 1885.

SUPREME COURT OF PENNSYLVANIA.

Error to Common Pleas, Luzerne County.

LEHIGH VALLEY FIRE INS. CO.)

vs.

DRYFOOS AND OTHERS.* }

Where the losses of an insolvent fire insurance company are about \$50,000, and the premium-notes \$174,000, of which \$79,391.27 represents unexpired policies, an assessment "to the amount of the premium-notes, * * * less all previous assessments," is so much in excess of the amount required for the payment of losses that, in an action on a premium-note by the assignee to recover the assessment due thereon, the burden is on him to show that such assessment was reasonably proper, in view of all the circumstances, and in the absence of such proof a verdict should be directed for the policy-holder.

Debt, by the Lehigh Valley Fire Insurance Company, to the use of W. J. Romig, assignee for the benefit of creditors, against Henry Dryfoos, W. A. M. Grier, and John C. Youngman, trading as Dryfoos, Grier & Youngman, to recover upon two premium-notes. This case was tried twice. A verdict upon the first trial having been rendered for plaintiff, the court granted a new trial.

RICE, P. J.

On February 2, 1877, the plaintiff company made an assignment for the benefit of creditors. On March 28th following, the directors met and passed the resolution of assessment upon which this action was based. The resolution is important, and we quote it at length:

* Decision rendered, April 25, 1887.—From *Atlantic Reporter*.

"Whereas, in consequence of losses by fire and other liabilities, amounting in the aggregate to about \$50,000, the L. V. Fire Ins. Co. have made an assignment for the benefit of its creditors, and in order that the affairs of the company may be settled as speedily as possible, therefore resolved that an assessment on the members of the company be laid to the amount of the premium-notes given by them, less all previous assessments, to pay on the losses by fire and other expenses of the company, and that the same be collected by the assignees in installments until the said losses and expenses shall have been adjusted and paid." On the trial the plaintiff recovered. The defendants' first proposition in support of the present rule is thus stated: "The assessment, as shown by plaintiff's testimony, was unauthorized, illegal, excessive, and void, and the court should have so instructed the jury in accordance with defendants' first, second, and third points."

We are of the opinion that the resolution above quoted contained all the essential elements of an assessment, and was valid as such, provided the facts, as they existed at the time it was made, justified it. It implies an ascertainment by the directors of the losses and liabilities which the assessment was intended to cover, and contains a statement of the amount with reasonable certainty. It also declares the rate which each member was to pay. What remained was a mere matter of calculation from known data. We think it was not necessary to specify the losses in detail, inasmuch as it covered all the unpaid losses and liabilities of the company; and it certainly was not necessary to set forth the name and amount of assessment of each policy-holder, or member whose policy had expired, but whose premium-note was still liable to assessment for the losses which had accrued: *Lycoming Fire Insurance Co. vs. Rought*, 97 Pa. St., 415; *Sands vs. Sanders*, 26 N. Y., 244, and 28 N. Y., 416.

But we were asked to give binding instructions that the assessment was not justified by the facts which were shown by the evidence to have existed at the time it was made. In deciding whether the court erred in refusing instructions to this effect, we recognize the principle that that view of the evidence must be taken which is most favorable to the plaintiffs. In other words, if any fair view of the evidence authorized the submission of the question to the jury, their verdict should not be disturbed, even though the court might possibly have reached a different conclusion from the same evidence.

The first fact which may be taken as established is that the company was insolvent. This in itself justified an assessment of some amount: *Schimpf vs. Lehigh Val. Fire Ins. Co.*, 86 Pa. St., 373. But there are many different phases of insolvency, and it does not necessarily and conclusively follow that the directors of a mutual insurance company would be thereby justified in making an assessment of the full amount of all the premium-notes in force, merely because of the inability of the company to discharge all of its liabilities at once. The delay incident to the collection of a sufficient sum from the members to meet the losses and liabilities which had accrued might be, and undoubtedly was in this case, ample justification for ceasing business, and making an assignment for the benefit of creditors, but was not a conclusive justification for an assessment of one hundred per centum on all the premium-notes in force. The liability of a member of a mutual insurance company on his premium-note left as a deposit, as the basis of an assessment, should occasion arise, is not an absolute liability to pay the whole amount of his note, but it is conditional, and depends upon the contingency of the happening of losses and expenses to which he shall be liable to contribute, which have been duly ascertained by the directors, and which made necessary a resort to an assessment thereon: *May, Ins.*, § 557. This liability is not changed by the facts which may indicate or require an assignment for the benefit of creditors. Notwithstanding the assignment, the functions of the creditors, so far as assessments are concerned, remained the same, and their discretion in that matter remained to be exercised according to the same rule of law as before. "That instrument passed only the assets of the corporation, not its franchises:" *Schimpf vs. Lehigh Val. Fire Ins. Co.*, 86 Pa. St., 373.

Coming now to the evidence as to the condition of the company, we think it is safe to say that there was evidence proper to be submitted to the jury of losses which had occurred in the years 1874-5-6-7 (during most of which time the defendants' policies were in force), amounting, with interest, to between \$40,000 and \$50,000. There was also evidence that the amount of premium-notes liable to assessment was \$174,000. Of this amount \$79,391.27 were notes which belonged to policies still in force on December 1, 1876, but how long they had been in force does not appear. The residue belonged to policies which had expired before that time; but when they had expired, whether before or after the defendants' policies were issued, does not appear by any express evidence. But inasmuch as they

were included in Mr. Datesman's statement to the board, and as that statement was admitted in evidence for the purpose of showing upon what basis the assessment was made, they cannot safely be disregarded. We have then, adopting Mr. Datesman's statement, the following figures, showing approximately the general condition of the company's affairs when the assessment was made:

Dec. 1, 1876, Premium-notes in force belonging to unexpired policies, - - - - -	\$ 79,391 27
Premium-notes liable to assessment, including the above, - - - - -	174,000 00
Unpaid losses for 1874, - - - - -	\$12,408 41
Unpaid losses for 1875, - - - - -	22,437 06
Unpaid losses for 1876, - - - - -	12,901 63
Total, - - - - -	<u>\$47,747 10</u>

"Did this state of affairs authorize the directors to make an assessment of the full amount of all the premium-notes in force? After a more careful examination of the evidence and the authorities than we could make on the trial, we are led to the conclusion that *prima facie* it did not. 'By the terms of the charter and the premium-note, the assured submits himself to the acts of the creditors, as the common representatives of all the members. He and they are all bound by the assessments made by them, unless he can show fraud or gross mistake. This is a rule of law he has no right to complain of:' Hummel's Appeal, 78 Pa. St., 320. It would seem, therefore, that, unless there is something on the face of the assessment to show its unreasonableness, the *prima facie* presumption is in its favor. Any other rule would be inconsistent with the nature of the contract, and would subject the company in its practical workings to manifold inconveniences. Nevertheless the presumption in favor of the action of the directors is not conclusive. 'Assessments must be limited to the objects declared in the charter and by-laws. The managers may exercise a reasonable discretion in fixing the amount to be raised, for the charter must be construed in reference to its practical working. The actual sum required can be ascertained; but as expense must be incurred in the collection, and loss be sustained in consequence of insolvency of members, proper allowances may be made for failures likely to result from these and other causes; and if the allowances are reasonable in amount, and consistent with good faith on the part of the directors, they will not vitiate the assessment. But if these reasonable limits are disre-

garded and transcended, purposely or by culpable carelessness, the assessment is illegal and void: *Jones vs. Sisson*, 6 Gray, 288; *People's E. M. Fire Ins. Co. vs. Babbitt*, 7 Allen, 235. In the latter case, and in *Traders' M. Fire Ins. Co. vs. Stone* (9 Allen, 483), it was held that an addition to the debts and reasonable allowance of one hundred per centum was so unreasonable as to make the assessment void. In these cases there was no evidence tending to justify so large an addition or excess; and, in the absence of such evidence, so large an excess, in most cases, would be *prima facie* proof of fraud or gross negligence: *Rosenberger vs. Washington Fire Ins. Co.*, 87 Pa St., 207. Taking the facts as they were presented to the board by Mr. Datesman's statement, we think the discrepancy between the total losses, and the whole amount of premium-notes which seemed to be liable to assessment for at least a portion of the losses is too great to be considered a reasonable allowance for expenses and uncollectible claims, without some express evidence to warrant that inference.

"Further, if an assessment of the full amount of all the premium-notes in force was so grossly excessive as to be vitiated thereby, we do not think it was cured by the concluding direction to the assignee to collect the same 'in installments, until all the said losses and expenses shall have been adjusted and paid.' If the assessment of the full amount of all the notes was warranted, we admit that this direction to the assignee would not invalidate it. But, if an assessment of that amount was not justified, the directors might as well have omitted to make an assessment at all, and simply directed the assignee to exercise his discretion, and to collect such proportions of the premium-notes as might be found necessary. They could not so delegate their functions, and, if the assessment depended for its validity solely on that direction to the assignee, we think it would be void for uncertainty.

"The next question is whether the assessment was valid as against these defendants. There seems to be good sense in, and authority for, the proposition that, if the ascertained losses accruing during the time that the defendants' policies were in force were so large as to justify an assessment of the full amount of their notes they cannot object to the validity of the assessment merely because other notes were included therein which would not be liable to contribute for any or all of those losses: *Sands vs. Sanders*, 26 N. Y., 244, and 28 N. Y., 416; *Long Pond Mut. F. Ins. Co. vs. Houghton*, 6 Gray, 77. To illustrate, we quote from the opinion in the last-cited case: 'The

case of the other defendant, Hunt, stands in a different position in this respect. Having become a member before the loss of eighth August, 1850, he might be properly assessed for all the losses and expenses after that date, and before the assessment was made. It is no objection open to him to the validity of the assessment that individuals who had more recently become members were also assessed for these losses, for some of which they were not liable. He is not injured thereby, as his assessment is not increased but diminished. He is therefore liable for the assessment.' Applying this principle to the case in hand, it follows that, while the general assessment was *prima facie* invalid on the ground of excessiveness, this it was competent for the plaintiffs to show, if they could, that it was not excessive so far as these defendants were concerned, and hence was not void as to them. But, being *prima facie* invalid on the facts already stated, the burden was cast on the plaintiffs of showing that it was valid as against the defendants. And here we think there is a failure of proof. The defendants became members of the company in the early part of 1874; their first policy being dated February 4th, and their second, June 1st. The assessment was made for losses occurring in the years 1874, 1875, 1876, and the early part of 1877. In order, therefore, to ascertain whether the defendants would be liable to an assessment of the full amount of their notes to cover these losses, it is essential to know, at least approximately—First, the date and amount of each loss; second, the whole amount of premium-notes in force on that date, and liable to assessment for that particular loss. With these data the percentage of each loss to be borne by the defendants would be a mere matter of calculation, and the sum of the percentages would constitute the ratio for ascertaining the amount which the defendants ought to contribute for the total losses. To this amount the directors are authorized to add reasonable allowances for expenses of collection, insolvency of members, and other proper matters. As we have already stated, the evidence shows the losses, and in many, if not most, of the cases, the particular dates and amounts, with reasonable certainty. It also shows the total amount of premium-notes in force, and of the premium-notes belonging to policies in force, on December 1, 1876. But it fails to show the total amount of premium-notes in force at the time of each loss, and liable to assessment for the same. Hence the jury had not the data before them for ascertaining the particular fact which, in view of the *prima facie* effect of the evidence as to the total amount of losses, and the total amount of premium-notes

apparently assessed to pay the same, was essential to the plaintiff's recovery. We have not overlooked the testimony of Mr. Stackhouse, but it is to be observed, with regard to his testimony that his calculation and statement were not the acts of the directors, or of their officer or clerk. They were made by Mr. Stackhouse, after the assignment, as clerk for the assignee, and did not constitute part of the directors' action in making the assessment. Therefore they cannot be allowed to have any conclusive or even *prima facie* effect as the acts of the defendants' agents. In so far as his calculation and statement were based on data in evidence we think they were competent, but not beyond that. Hence they were not evidence *per se* of the premium-notes outstanding and liable to assessment at the respective dates of the several losses; and, not finding any other evidence in the record of that fact, we are led to the conclusion that the defendants' third point should have been affirmed.

This conclusion renders any discussion of the other rulings of the court complained of unnecessary. As these questions are likely to arise on the second trial of the case, it is advisable to express no opinion upon them in advance.

"The reason based on the alleged misconduct of counsel in the argument to the jury is not sustained. It is undoubtedly improper—and this the counsel concedes frankly—to allude to evidence which has been offered and rejected. But we are fully satisfied that any injurious effect which might have resulted from the transgression of this rule by the plaintiff's counsel was totally destroyed by the remarks which the defendant's counsel immediately made to the opposing counsel and to the jury.

"The reason based on the alleged misconduct of one of the jurors is also overruled. If the juror said to his fellow-jurors what, according to the testimony of the tipstaff, he admitted he said, his conduct deserves condemnation. But we do not think the evidence as to his declarations, after the verdict had been agreed upon, is competent. Under the policy of the law, evidence of the fact could not be received directly from his lips; *a fortiori*, second-hand proof, consisting of his unsworn admissions of the fact, cannot be received to impeach the verdict. *Building Ass'n vs. Mitchell*, 2 Kulp., 343, and cases cited."

Upon the last trial, the court charged the jury as follows: "This is an action brought by W. J. Romig, the assignee of the Lehigh Valley Fire Insurance Company against the firm of Youngman, Grier & Dryfoos, to recover assessments on certain policies of insur-

ance which had been issued by the Lehigh Valley Fire Insurance Company to the defendants. The case was tried once before, and all of the testimony taken was reduced to writing. A point was submitted at that trial to the effect that, on the evidence as then presented, the plaintiff was not entitled to recover. After a consideration of the case upon a rule for a new trial, we came to the conclusion that the point was well taken, and, as there is no other testimony in the cause, the counsel submit it to the jury upon the evidence adduced upon the former trial, to be ruled upon by us upon that testimony. This is done for the purpose of saving time, and also, as we understand it, for the purpose of obtaining a speedy review of the conclusion of the court. We therefore instruct you, pursuant to the third point submitted upon the former trial, that your verdict should be for the defendant."

Verdict accordingly for defendants, and judgment thereon; whereupon plaintiff took this writ.

F. W. WHEATON and E. P. & J. V. DARLING, *for Plaintiff in Error.*

Assessments are limited by the charter and by-laws and are left to the discretion of the managers: *Rosenberger vs. Washington Fire Ins. Co.*, 87 Pa. St., 207; *Hummel's Appeal*, 78 Pa. St., 320; *Sands vs. Sanders*, 26 N. Y., 244; 28 N. Y., 416; *Long Point Mut. Ins. Co. vs. Houghton*, 6 Gray, 77.

ALLAN H. DICKSON and H. W. PALMER, *for Defendants in Error.*

The liability on the premium-notes is not absolute, but is conditional on the happening of losses: *Hays vs. Lycoming Ins. Co.*, 99 Pa. St., 626. An excessive assessment is invalid: *People's Mut. Ins. Co. vs. Babbitt*, 7 Allen, 235; *Traders' Mut. Ins. Co. vs. Stone*, 9 Allen, 483; *Jones vs. Sisson*, 6 Gray, 288; *Rosenberger vs. Washington Mut. Ins. Co.*, 87 Pa. St., 212; *Great Falls Mut. Ins. Co. vs. Harvey*, 45 N. H., 292.

PER CURIAM.

It is true that assessments considerably in excess of the amount actually required for the payment of losses have frequently been sustained. If not much in excess, the presumption is that the gross sum was properly laid in view of the costs attending the collection of numerous small amounts, and the probable insolvency of the makers of some of the notes. In such cases the burden of showing the assessment to be excessive is on the person alleging it to be so. The assessment, however, may be so much in excess of the amount required for the payment of losses as to change the burden of proof,

and compel the company to prove that it is reasonably proper in considering all the circumstances. That is just this case, and, the company having wholly failed to give any evidence showing the sum to be reasonable and proper, there was no error in giving binding instructions to the jury to find for the defendant. The reasons for this conclusion are well stated in the able opinion of the learned judge in discharging the rule for a new trial. Judgment affirmed.

SUPREME COURT OF MICHIGAN.

Error to District Court, Saginaw County.

UTTER

vs.

TRAVELERS INS. CO.* }

The insured under an accident policy was a deserter from the army and an officer instructed to arrest him, shot and killed him upon the insured appearing at the door of a house where he was stopping. The evidence was conflicting whether the officer knew that the man he shot was the party for whom he was searching, and whether the shooting was done in self-defense, because threatened with a pistol. The policy provided that death must be proved to be due to external violence and accidental means, and not the result of design, either on the part of the insured or any other person.

Held, That if the officer did not know that the insured was the party he fired at and did not intend to kill him, it could not be claimed as a matter of law that the death was the result of design within the policy.

Held, That it cannot be claimed as a matter of law that the insured was doing an unlawful act at the time of the killing; the question is one for the jury.

HANCHETT & STARK, *for Plaintiff and Appellant.*

WISNER & DRAPER, *for Defendant.*

MORSE, J.

The defendant, on the seventeenth day of September, 1880, in consideration of a premium then paid by him, issued and delivered to William Samuel Utter an accident insurance policy for the benefit of the plaintiff, who was his mother. This policy insured said Utter against death occurring through violent, external, and accidental means, for one year, in the sum of \$1,000. When this insurance

* Decision rendered, April 28, 1887.

was effected, the said Utter was under age, and had before that time enlisted as a musician in the regular army. March 28, 1880, he deserted the service while stationed at Fort Verde, Arizona, and went to Los Angeles, California. He was at the latter place when insured, and at the time of his death, which occurred within the life of the policy, February 12, 1881. After complying with the requisites of the policy as to proofs of death, and after refusal of payment thereon, the plaintiff brought suit for the recovery of the sum named therein in the circuit court for the county of Saginaw.

The defendant pleaded the general issue, and gave notice under the same that it was provided in the policy as follows: "And no claim shall be made under the policy when the death or injury may have happened in consequence of voluntary exposure to unnecessary danger, or while the insured was, or in consequence of his having been under the influence of intoxicating drinks, or while engaged in or in consequence of any unlawful act;" and said defendant will show and prove, upon the trial of said cause, that William Utter, the assured named in said policy, was a soldier in the army of the United States, and while so engaged, on or about the twenty-eighth day of March, 1880, deserted and fled from his post and command; and while being a deserter, and endeavoring to avoid capture as a deserter, and being returned to the army authorities, and while seeking to escape arrest as a deserter, was shot and killed. And said defendant will also show that, at the time said William Utter received the injury which resulted in his death, he was intoxicated; and also that such injury was received in consequence of his having been under the influence of intoxicating drinks. And defendant will also show that the death of said William Utter happened in consequence of his voluntary exposure to unnecessary danger, and in consequence of his unlawful act, in that, being a soldier in the army of the United States, he became and was a deserter therefrom on or about the 28th day of March, 1880, thereby subjecting himself to pursuit and attempted capture, and the danger and peril attending the same, and thereby being engaged in an unlawful act; and while being such deserter, and while attempting to escape capture, and thus exposing himself to unnecessary danger and peril, and while thus engaged in an unlawful act, the said William Utter was shot and killed by an officer who was endeavoring to arrest him as a deserter, and from whom said Utter was seeking to escape. The defendant will show also that the said William Utter was killed while engaged in an unlawful act, and also in consequence of an unlawful

act, within the meaning of said policy, in that he did commit an assault upon one J. A. Berry, by pointing directly at him (said Berry) a pistol in a threatening manner, and so as to induce in the mind of said Berry the belief that he intended to fire, and that he (said Berry) was in danger, and thereupon, in consequence of said act of Utter, said Berry shot and killed him."

The policy also contained the following clause, which becomes material in the discussion of the case as it stands in this court: "And this insurance shall not be held to extend to disappearances, nor to any case of death or personal injury, unless the claimant under this policy shall establish, by direct and positive proof, that the said death or personal injury was caused by external violence and accidental means, and was not the result of design, either on the part of the deceased or of any other person."

Upon the trial, at the close of the testimony, the circuit judge directed a verdict for the defendant. The jury rendered such verdict, and judgment passed thereon for the defendant.

Utter was killed in a house of ill fame in Los Angeles, by a pistol-shot fired by one Berry, a deputy sheriff of Los Angeles County. It seems that the captain of the company to which Utter belonged learned of his whereabouts, and telegraphed to the sheriff a description of Utter, stating that he was a deserter. This telegram was shown to Berry, and he was instructed by the under-sheriff to arrest Utter. Berry, without any other warrant, process, or other authority, went to this house where Utter was, and shot and instantly killed him. The facts as to the killing are conflicting, as stated by the different witnesses.

George Branagan, who testifies on behalf of the plaintiff, says that Utter, John H. Sheehan, and himself were in the house together, sitting in a room used as a kitchen, talking together. Utter said a policeman was after him. After they had sat there some five or ten minutes, some one came to the front door and rapped very loud. The door was locked. There was a door of the kitchen opening out on an alley-way that ran into the street. Some one came and rapped at that door, and then stopped. The noise stopped a little while. Perhaps a minute afterwards Utter got up and opened the door. A shot was fired, and he fell. Then one Berry came through the door with his pistol in his hand; pointed the pistol at Sheehan, and told him to throw up his hands; saying to him, "I believe you are Billy Utter." Sheehan replied, "No; you've killed your man." The door through which Utter was shot opened on the inside of the room, and

turned on its hinges to the right, so that it was impossible almost for one at the same time to use any weapon. "The shot was fired as soon as the door was opened wide enough to allow Utter to poke his head around, and look out." Branagan did not hear anything spoken, either by Berry or Utter at the time. Had anything been said, thinks he would have heard it. Utter was shot in the head. He was not under the influence of intoxicating liquors, and Branagan did not see any revolver in his hand when he was shot.

Berry testified on the part of the defendant that he was deputy sheriff of Los Angeles County; that on February 12, 1881, he received instructions from the under-sheriff to arrest William Utter. He had no warrant or other writ, and no complaint had been lodged against Utter. Had no authority except the under-sheriff's instructions, and a telegram he had seen, the substance of which was to arrest Utter, he thinks, for being a deserter; that, on receipt of telegram, he asked Jeff. Thomson to go with him. They found Utter in a house of ill fame on Los Angeles Street, in Los Angeles, California. Witness looked through the blind into the room, and saw Utter and another man in a room. He then sent Bottelle, a man who was with witness, to arm himself. While he was gone, a woman came out of the house, and ordered witness off. He refused to go, but followed her into the house. When he got to the room where he had seen Utter, there was no one in it. Heard a noise in an adjoining room, and tried to enter that room, but the door was locked. He then heard a noise as of a door opening on the outside, and passed out, and was approaching an outside door, when the door opened, and Utter appeared. Witness told him, in substance, —he cannot remember the exact language,—to throw up his hands; that he (witness) was an officer, and arrested him. The moment that he presented his pistol and spoke to him, Utter stepped back a step, and raised his pistol, pointing it at witness. Witness fired, and Utter fell. The moment the door opened, witness commanded him to throw up his hands, and there was no other conversation. Utter did not speak. "Don't know whether his revolver was cocked or not; but considered his action threatening and dangerous. It was between 8 and 9 o'clock in the evening. Branagan and another party were in the house with Utter. I knew Utter by sight. I recognized him when I saw him. I spoke as soon as the door opened, disclosing him."

Three other witnesses, who did not see the shooting, testified that they each came there shortly after, and saw a pistol lying on the

floor beside the body of Utter. The plaintiff also introduced evidence tending to show that Utter was partially deaf, so that his hearing was materially affected; that neither his father nor mother consented to his enlistment, and that the father, at the time of the killing, was engaged in measures to obtain his release from the service.

Upon this testimony, which is here substantially given, the court below based its opinion "that the injury was a pistol-shot wound, and the firing of the pistol was not accidental, but designed by the firing party, and that the policy was not intended to insure against murder or willful killing of any kind, but intended to insure against ordinary accidental means alone,—what we properly know as accidental." It is true, as the court below said, that there is no dispute with regard to the fact that the officer intended to shoot, and intended to inflict bodily injury upon some person. The officer deposes that he knew it was Utter when he fired, but the evidence of Branagan tends very strongly to show that he did not know it was Utter he had shot, and, after he came into the room, thought Sheehan was Utter, until informed by the latter that he "had killed his man."

It is claimed by the counsel for the plaintiff that the "design" mentioned in the policy must be considered as a design to kill Utter, and that there was evidence in the case sufficient to go to the jury, tending to show that the act that caused the death of Utter was not done with the design of killing him. In other words, if Berry went to the house where Utter was, not with the intention of killing him, but for the purpose of arresting him, and when the door was opened, by reason of Utter's drawing a pistol, or any other cause, he fired, not knowing it was Utter, although the death of Utter was caused thereby, and Berry meant to kill whoever it was, it cannot be held that the death of Utter was caused by design; that, when the design was to kill, it must also be a design to kill Utter, then formed in the mind, and intentionally carried out by the act.

If a person should draw a pistol in a crowded street, and deliberately fire the same, with the intent of killing some one, or with a reckless disregard of human life, and a person was killed or wounded, would such killing or wounding be an accident, in the meaning of this policy, or would it be by the design referred to therein? There would undoubtedly be a design to kill or wound some one, but no design to kill or wound the particular person injured. Suppose that, for the purposes of plunder, persons arrange to throw a passenger train off a railroad track, knowing that such

act is liable to kill or injure some one, but having no malice against any individual thereon, or any design to kill any particular person, and the train is derailed, and the assured killed, can it be said that his death was not accidental, under this policy, but by the design of some person? The argument may be carried further. Suppose one fires a pistol in the air. He fires by design, but does not intend to kill any one. The shot strikes the assured, and kills him. The act which causes the death—the shooting of the pistol—is designed, and therefore not accidental, but the killing is certainly accidental, and not designed. If the pistol is fired at one man, and hits another, is it any less accidental, as far as the person hit is concerned, to the mind of the person who does the shooting? And, if the shot is fired at the assured in the belief that he is another man, is not the character of the act the same? If one designedly roll a stone down a mountain side with no intent to injure any one, and in its course it crush a man, it is an accident. If it were purposely rolled down to crush one man, and it is deflected from the course intended, and it kills another, is it not equally an accident? The design or purpose was not to kill the one injured, because it was intended to kill another, and not him. The criminal intent of the one putting the stone in motion may render him guilty, and responsible for the actual result, though not intended; yet the death of the person thus killed must be considered, as far as he is concerned, an accident, as his death was not intended by any one.

It seems to me that the design intended by the terms of this policy must be the design that intended the actual result accomplished, and not the design of the act itself, which act resulted in the killing of one contrary to the design of the act. If, when Berry fired this shot, he did not know the man he fired at was Utter, and did not intend to kill Utter, it cannot be said that Utter lost his life by the design of Berry. Nor can it be held, as a matter of law, that Utter was engaged in an unlawful act, within the meaning of this policy. If he had been shot in the act of deserting, this claim might be made with some reason and propriety, but such was not the case here. Neither was he shot because he was a deserter, nor because he was in a house of ill fame. He was shot, if Berry is to be believed, because he did not throw up his hands when commanded to, and was in the act of drawing a pistol. He was killed, if Branagan is to be believed, without provocation, and in a wanton and murderous manner, as soon as his head appeared in the door. Whether he was doing anything unlawful at the time

of the shooting was also a question for the jury, to be determined by them under all the circumstances of the case.

If, on being refused admittance after rapping on the door, the officer had fired through the door, and killed Utter, it could not be claimed that Utter was killed by design, or because he was engaged in any unlawful act; nor if Berry fired at the first head he saw poked out of the door, not knowing or caring who it was, can it be held that the death was by design against Utter, or in consequence of any unlawful act on his part. The clauses in the policy requiring direct and positive proof that the death was caused by external violence and accidental means, and was not the result of design, either on the part of insured or of any other person, cannot be allowed to govern the courts in cases of this kind. The intent of Berry is locked within his own breast, and can be only determined by his own evidence, or the inferences to be drawn from his acts, which latter would be in the nature of circumstantial proof. If Berry himself had been killed, it would have been impossible, by "direct and positive proof," to show what his real design was, and it would also be manifestly against the policy of the law, and diametrically opposed to justice, to allow his own testimony of his motives, however unsatisfactory it might be, to be controlling, when all the facts of his actions and language at the time contradicted his positive assertions of his intent upon the trial. If this clause can be allowed to stand, any person accidentally killed, when no one is by, is debarred from the benefit of his insurance. Circumstances may plainly and almost certainly indicate that he was killed by accident, and yet no positive and direct proof can be furnished. If an accident happen upon a railroad by the fault of one of its employes, who is killed by the accident, his design in causing such accident cannot be shown by direct and positive proof, and the beneficiaries of an assured person killed by such accident cannot recover. The design of the person responsible for the killing can in no case be directly and positively proven except by his own evidence or admissions.

Courts will not permit the course of justice, upon trials before them, to be stipulated or contracted in such manner as to defeat the ends to be subserved by such trials. The parties to the contract cannot agree to oust the courts of jurisdiction over such contract. The operation of this clause, requiring direct and positive proof, in many cases would, in effect, preclude the court from jurisdiction and bar recovery. If they can make this agreement, they

can also stipulate that the evidence must come from certain persons, or make any agreement they see fit, controlling and directing the course of proceeding upon the trial. They may contract in relation to a condition precedent before bringing suit, or in relation to anything going to the remedy, but not to the right of recovery itself : *Wood, Ins.*, 750. Circumstantial evidence is regarded by the law as competent to prove any given fact ; and sometimes it is as cogent and irresistible as direct and positive testimony. The case should have been submitted to the jury. The "design" mentioned in the policy must be considered a design on the part of Berry to kill Utter ; and if, at the time he fired the pistol-shot, he did not intend to kill Utter, or did not know that the man he was shooting was Utter, there is nothing in the present record to prevent a recovery by the plaintiff.

When a stipulation or exception to a policy of insurance, emanating from the insurers, is capable of two meanings, the one is to be adopted which is the most favorable to the assured : *May, Ins.*, §§ 174, 175 ; *Wood, Ins.*, 140, 147 ; *Allen vs. Insurance Co.*, 85 N. Y., 473.

There was evidence in the case having a tendency to show that Berry did not intend to kill Utter, and did not know that the person he had killed was Utter until after the shooting.

The judgment, therefore, in my opinion, should be reversed, and a new trial granted, with costs of this court to plaintiff. The other justices concurred.

SUPREME COURT OF IOWA.

Appeal from Circuit Court, Polk County.

DAVIDSON

vs.

HAWKEYE INS. CO.*

After the issue of the policy, the insured entered into a written contract with L., by which the latter agreed to pay \$400 for the property, \$50 being paid down and the balance to be in six payments. The contract provided that if L. should promptly make all the payments, the insured and the insurer should execute a deed, but that time was of the essence of the contract, and any failure in payment should avoid it, and any payments made be forfeited. L. entered into possession under the agreement, and the property was burned before the first deferred payment became due. The policy provided that it should be void in case the property should be sold or conveyed without consent.

Held, That there had been a sale which worked a forfeiture.

GUTHRIE & MALY, *for Appellant.*

PHILLIPS & DAY, *for Appellee.*

ADAMS, C. J.

1. The court gave a peremptory instruction to render a verdict for the defendant. The plaintiff assigns as error the giving of such instruction. The instruction was given upon the theory that the pleadings and evidence showed conclusively that the plaintiff violated the policy, and forfeited his rights thereunder, before the loss. The policy contained a condition against selling, conveying, or incumbering the property. The defendant contended that the plaintiff violated the condition by entering into a contract of sale,

* Decision rendered, March 19, 1887.

by which contract the plaintiff took possession, and the defendant received a part of the purchase-money, and retained the legal title, which was to be conveyed upon the payment of the balance. The making of such contract is not denied. The plaintiff, however, denies that the contract was of such a character as to constitute a completed sale.

The building insured was a dwelling-house, situated upon a small farm in Polk County. After the policy was issued, to wit, in March, 1885, the plaintiff and one Lint entered into a written contract whereby Lint was to pay the plaintiff for the same \$400, of which \$50 was to be paid down, and the balance in six payments, the first one of which was to be made January 1, 1886. Lint took possession under the contract, and leased the farm to his son, who cultivated it, and occupied the house as a dwelling until it was destroyed by fire. The contract of sale provided that, if Lint should promptly make all the payments called for by the contract, the plaintiff would execute to him a deed of warranty to the land, but that time should be regarded as of the essence of the contract, and that, if Lint should fail to make any payment at the time stipulated, the contract should be void, and any payments made should be forfeited. Before the first deferred payment became due, the insured property was destroyed.

The precise language of that portion of the policy which is alleged to have been violated, is in these words: "In case any such property shall be sold, conveyed, or incumbered * * * without the written consent of this company is obtained, * * * this policy shall immediately thereafter be null and void." It is manifest from the above that the policy contemplated that there might be a sale without a conveyance. The provision is the same as if the word "or" had been expressed between the words "sold" and "conveyed," and as if the policy read: "In case any such property shall be sold or conveyed," etc. In either case the policy would be void. We come, then, to the question as to whether, where one party binds himself unconditionally to pay a certain price for a piece of real estate, and takes possession under the contract, and the other party binds himself to convey the real estate upon the payments being made, and nothing remains to be done but for the party taking possession to make the payments, and for the other to make the deed, such contract constitutes a sale of the real estate, within the meaning of the policy. In answer to this question we have to say that we think it does.

Lint was the real owner of the house that was burned. The loss was his loss. The plaintiff lost nothing, unless he needed the house for security. If Lint is responsible, or the property, without the house, is sufficient security for the balance of the purchase-money, the plaintiff's claim can be collected, and he will have all that he would have had if the house had not been burned. If he is allowed to collect the insurance, and the purchase-money both, he will profit by the destruction of the property. That the insured shall not by his own voluntary act come to have an interest in the destruction of the insured property is forbidden, not only by public policy, but by all the maxims of insurance, and is precisely what this defendant attempted to guard against. If the contract had been of that nature that the loss of the house fell upon the plaintiff as owner, and not upon Lint, the case would be entirely different. We can suppose a case where the owner of insured property makes a contract for the sale of it, but has not made a conveyance of the property, nor delivery of possession, but has retained control, and while under his control and care the property is destroyed by fire, and the seller cannot complete the contract by making such delivery as the contract contemplates, then the loss of the property would fall upon him, notwithstanding his contract, and for the reason that he is not able to carry it out, and it might well be said in such case that there was no sale within the meaning of the policy.

The plaintiff relies, in part, upon the fact that in the contract time was made of the essence of the contract. But that was a mere provision for its termination. The seller might elect to reclaim the property if the buyer failed to pay promptly as he stipulated; but, while the contract subsisted, it appears to us that the relation which each party sustained to the property was not different from what it would have been if the contract had been drawn without the provision as to forfeiture if the payments were not made upon the day they fell due. Until forfeiture, Lint was the owner of the property, in the sense that the loss of the house must fall upon him.

The plaintiff cites *Kempton vs. State Ins. Co.* (62 Iowa, 83, 17 N. W. Rep.), and several other cases. But those cases all differ from the case at bar. In those cases something yet remained to be done by the vendor in addition to the execution of the deed.

We are aware that reasoning is used in some of the cases which might seem to support the plaintiff's position. Take the case of *Turnbull vs. Portage Mut. Ins. Co.*, 12 Ohio, 814. In that case the court said: "This case turns mainly on the question as to whether

the plaintiffs had an insurable interest in the premises insured at the time the loss occurred." Now, it is not to be denied that any vendor of real estate who has not received full payment, and retains the legal title for security, has an insurable interest. But it does not follow, we think, that there cannot be a sale of real estate where the legal title has not been conveyed, and a part of the purchase remains unpaid. The very theory that the vendor who retains the legal title with a right to enforce the payment of the purchase-money holds the legal title for security is based upon the idea that there has been a sale; and in such cases it is manifest that a loss by fire must fall upon the purchaser as owner, and affects the seller only as it impairs his security. The seller may, indeed, have an insurable interest, but his interest is substantially that of a mortgagee, which is quite different from a proprietary interest. Different rates are charged; and in case of the insurance of a mortgage-interest, and payment to the mortgagee of a loss, a right of subrogation accrues to the company to the extent of the amount paid. The law will not allow an insured mortgagee to be subjected to the temptation that he would be subjected to if he had a right to collect his insurance, and at the same time to collect and hold his whole mortgage-debt besides.

There is a fundamental and vicious error in the doctrine contended for by the plaintiff. He would collect the insurance upon the theory that there has been no sale, and would collect his purchase-money upon a theory which is just the reverse. If the doctrine for which he contends is correct, he would be able to collect the full amount of his policy, though only a single dollar of the purchase-money remained unpaid.

2. The plaintiff assigns as error the exclusion of certain evidence. He offered to prove that only a part of the payment was made, which, by the terms of the contract, was to be paid at the time it should take effect. The court excluded the evidence as immaterial. It was, of course, the right of the plaintiff to insist upon the whole of that payment, or that the contract should not take effect. But the contract provided that time was of the essence of the agreement, and that all payments made might be forfeited if the buyer made any default. Now, the plaintiff could not be allowed to accept partial payment, and say at the same time that, the payment being partial, the contract is void, and the partial payment thus made is forfeited. The very act of accepting partial payment was a waiver of strict performance as to the balance of that payment. No other

theory would consist with good faith. The acceptance, to be sure, was not a waiver of the payment of the balance, and the plaintiff, unless there was an agreement to the contrary, might probably demand it at any time. But, after accepting partial payment, we think that the plaintiff should have demanded the balance before he could properly claim that Lint was in default. We think that the contract took effect, and that the contract, together with the delivery of possession, constituted a sale.

3. The plaintiff assigned as error the exclusion of other evidence. He offered to show that before the loss the parties had abandoned the contract, but the court excluded the evidence as immaterial. If the policy had been forfeited by the making of the contract, we do not think that we could hold that it would be waived by an abandonment of the contract. Suppose that the plaintiff had forfeited the policy by a sale and conveyance, no one would, we think, claim that the policy would be revived by a repurchase and reconveyance. Yet the principle involved would be the same.

We see no error in the ruling of the circuit court. Affirmed.

REED, J. (dissenting).

The contract between plaintiff and Lint was an executory agreement for the sale and conveyance of the property. Plaintiff was bound, upon the strict performance by Lint of his undertaking, to convey the land. But a failure by the latter to pay any installment of the purchase-price at the stipulated time would work a forfeiture of all interest in the land, as well as of all sums paid under the contract; and the agreement provided that upon such failure the vendee would surrender possession of the premises. What was the extent of the right and interest acquired by Lint under this contract? I think he did not acquire the ownership of the property, but the right acquired was the right to be invested with the ownership when he performed his undertakings in the contract. Until that was done, both the title and ownership remained in plaintiff; for, by the terms of the agreement, Lint would be entitled to be invested with the property only upon a strict performance of its condition, and upon his failure to perform any of them, nothing further was required to be done for the establishment of a perfect right in plaintiff. Now, what the parties provided against by the claim in the policy quoted in the majority opinion was such disposition of the property as would divest the plaintiff of the title and ownership of it; and the uniform holding of the authorities is that the policy is not defeated, under a provision to that effect, by

an executory contract for the sale of the property: *Hill vs. Cumberland Valley M. P. Co.*, 59 Pa. St., 474; *Insurance Co. vs. Updegraff*, 21 Pa. St., 513; *Insurance Co. vs. Stewart*, 19 Pa. St., 45; *Trumbull vs. Insurance Co.*, 12 Ohio, 305; *Browning vs. Insurance Co.*, 71 N. Y., 508; *Washington Ins. Co. vs. Kelly*, 32 Md., 421; *Kempton vs. State Ins. Co.*, 62 Iowa, 83, 17 N. W. Rep., 194; *Wood, Ins.*, § 329; *May, Ins.*, § 267.

In *Kempton vs. State Ins. Co.* it was held that the policy which contained a provision similar to that in question was not defeated by a contract for the sale of the property. The only difference between that case and this lies in the fact that the purchaser in that was not entitled to the possession of the property until certain payments were made, and the vendee was in possession at the time of the loss, while in this the purchaser was in possession when the fire occurred. But that is not material. The ground of the holding in that case is that the insured was not divested of the ownership of the property by the contract, and that is the case here.

In my judgment, the holding of the majority is in conflict with that case, as well as with the current of authorities on the subject.

SUPREME COURT OF PENNSYLVANIA

Error to Common Pleas, Somerset County.

GERMAN-AMERICAN INS. CO.

vs.

HOCKING.*

A policy of fire insurance which permitted concurrent insurance provided that, in case of loss, immediate notice should be given the company, and as soon thereafter as possible, proof thereof, under oath, setting forth, *inter alia*, the amount of other insurance, the actual value of the property burned, and containing a plan and specification of the building. The insured, by the terms of the policy, was entitled to recover no greater proportion of the loss than the amount of the policy should bear to the whole amount of insurance. The loss was to be paid sixty days after due notice and proofs of the same were given the company, unless the property be replaced, or the company give notice of its intention to rebuild or repair the damaged premises. The building covered by the policy was totally destroyed by fire, and notice was immediately given the company. More than two months after the fire the secretary of the company requested from the insured more specific proofs of loss, and about a month thereafter these were furnished, but without plans or specifications. Suit was brought on the policy twenty days after the proofs were furnished. *Held*, That under the conditions of the policy, the company was entitled to the full proofs as a prerequisite of payment, and that, as the company had sixty days after the proofs were furnished to pay or rebuild, the suit was prematurely brought.

Assumpsit by George H. Hocking against the German-American Insurance Company of Pennsylvania upon a policy of fire insurance for \$1,000. The facts are fully stated in the opinion. Verdict for plaintiff, \$1,100.66, and judgment thereon; whereupon defendant took this writ.

* Decision rendered, March 7, 1887.—From *Atlantic Reporter*.

W. H. KOONTZ, *for Plaintiff in Error.*

The conditions attached to a policy are binding on the parties: Fire Ass'n Trustees vs. Williamson, 26 Pa. St., 196; Desilver vs. Insurance Co., 38 Pa. St., 131; Kensington Nat. Bank vs. Yerkes, 86 Pa. St., 227. This is not a valued-policy: May, Ins., 27; Cox vs. Insurance Co., 45 Amer. Dec., 771; Insurance Co. vs. Mitchell, 48 Pa. St., 372. The suit was prematurely brought: Camberling vs. McCall, 2 Yeates, 281; Kimball vs. Insurance Co., 8 Bosw., 495; Bryant vs. Insurance Co., 6 Pick., 131; Hatton vs. Insurance Co., 7 U. C. C. P., 555; Davis vs. Davis, 49 Me., 282; Insurance Ass'n vs. Evans, 13 Wkly. Notes Cas., 203.

COFFROTH & RUPPEL, *for Defendant in Error.*

As the loss was total, and the company was so notified immediately after the fire, further notice was unnecessary: Insurance Co. vs. Schollenberger, 44 Pa. St., 262; Insurance Co. vs. Moyer, 97 Pa. St., 441; Insurance Co. vs. Davis, 98 Pa. St., 280; Insurance Co. vs. Dougherty, 102 Pa. St., 568. The proofs of loss were a substantial compliance with the policy: Assurance Co. vs. Ackerman, 2 Penny., 145; Hall vs. Insurance Co., 3 Phila., 332; Insurance Co. vs. Morrin, 13 Wkly. Notes Cas., 345; Insurance Co. vs. Cusick, 16 Wkly. Notes Cas., 136; Insurance Co. vs. Schreffler, 42 Pa. St., 188. Defendant resisted the claim on grounds independent of the question of the suit having been prematurely brought, and therefore that defense should not avail now: Insurance Co. vs. Moyer, 97 Pa. St., 449; Insurance Co. vs. Meckes, 10 Wkly. Notes Cas., 306.

CLARK, J.

On the third December, 1884, the German-American Insurance Company of Pennsylvania issued a policy of fire insurance to George H. Hocking, in the sum of \$1,000, "on his two-story, frame, tin-roof building, occupied for mercantile purposes and family residence, situate on west side of Centre Street, Myersdale, Pennsylvania," etc.; "the company covenanting to make good unto the assured all loss, not exceeding in amount the sum insured, as should happen to the premises from fire, from the twenty-ninth November, 1884, to the twenty-ninth November, 1885;" "the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proofs of the same shall have been made by the assured, and received at this office, in accordance with the terms and provisions of this policy, unless the property be replaced, or the company has

given notice of its intention to rebuild or repair the damaged premises." By a further provision of the policy, concurrent insurance was permitted; and the insured, in case of loss, was entitled to recover no greater proportion of the loss than the amount of the policy now in suit should bear to the whole amount of the existing insurance. The insured, at the time of the loss, held concurrent insurance to the amount of \$3,000. The tenth condition of the policy required that persons having a claim under it should give immediate notice thereof to the company, and as soon thereafter as possible render a particular account and proof thereof, signed and sworn to by them, setting forth—First, a copy of the written portion of the policy, etc.; second, the amount of other insurance, etc.; third, the actual value of the property burned, etc.; fourth, the ownership, etc.; fifth, for what purpose it was used, etc.; sixth, if the claim be for a loss on a building burned, he shall furnish a plan and specification of the building destroyed, etc.; seventh, the date of the loss, etc.; and, eighth, how the fire originated.

On the fourth December, 1884, the building was totally destroyed by fire, and the next morning the company received notice of a total loss. The building was worth from \$4,200 to \$5,000. Proofs were not furnished until March 28, 1885. The suit was brought on the seventeenth April, 1885. The company contend that the plaintiff below did not comply with the tenth condition of the policy in two essential particulars: First, he did not furnish proofs of loss as soon as required; and, second, that the proofs, which were furnished did not contain a plan and specification of the building destroyed, and therefore that the plaintiff cannot recover, or, at the least, the suit was prematurely brought. The plaintiff below, in reply to these several matters of defense, says—First, that, as the loss was total, the notice, which was given immediately after the fire, was sufficient; and, second, that the company accepted the proofs which were furnished without objection, thereby waiving the matters which were omitted therein, and therefore, assuming the original notice of the fire to have been sufficient, the suit was brought more than sixty days thereafter, and cannot be abated on that ground.

In support of the first proposition the plaintiff below cites *Lycoming Ins. Co. vs. Schollenberger*, 44 Pa. St., 259. In that case one of the conditions of the policy was that, in the event of loss, notice should be given forthwith, and a particular statement of the loss should be furnished to the company within thirty days. The subject of insurance was a coal-breaker. It was insured in a sum not

exceeding \$2,500, and the loss was total. A notice was forthwith forwarded to the company, giving the number of the policy, the amount of the insurance secured thereby, and stating that "the coal-breaker was burnt down" on that day. In the decision of that case the court treated the notice as a substantial compliance with the conditions of the policy. "This was as particular a statement," says Mr. Justice Thompson, "as could be given. The subject of insurance was a single structure. The amount to be paid for it, in case of loss, was fixed and referred to, and it was reported as a total loss; the particular statement required would have contained but this, in substance, if it had been made." To the same effect are the cases of *Farmers' Mut. Ins. Co. vs. Moyer*, 97 Pa. St., 441; *Home Ins. Co. vs. Davis*, 98 Pa. St., 280; *Pennsylvania Fire Ins. Co. vs. Dougherty*, 102 Pa. St., 568; *Susquehanna Ins. Co. vs. Staats*, id., 529; *Same vs. Cusick*, 16 Wkly. Notes Cas., 133. In all these cases it was held that a particular statement or an account of the several items of a loss could not, in the nature of the case, have been intended where there was only a single subject of insurance, and the loss was total; that such a statement was obviously only meant to be furnished when there was a loss of several distinct items of insured property, or when the loss was partial only.

But it will be observed that the policy in suit requires that certain specific matters shall be stated to the company, under oath, which by its special provisions are as essential, in the ascertainment of the extent of the company's liability, where there is but a single subject insured, and a total loss, as the particular statement is where there are numerous subjects, or the loss partial. By the express terms of the policy, concurrent insurance was permitted, and the insured, in case of loss, was entitled to recover no greater proportion of the loss than the amount of the policy bore to the whole amount of the existing insurance; and the second clause of the tenth condition of the policy thereupon provides that the assured, in his particular account of the loss, shall set forth the "other insurance, if any, on same property, or any portion thereof, with copies of the written portion of each policy, and indorsements thereon." Another of the terms of the policy is that the property destroyed may be replaced or rebuilt, or the damaged premises may be repaired, and therefore the sixth clause of the same condition provides that "if the claim be for the loss on a building, the assured shall furnish a plan and specification" thereof.

The clauses quoted illustrate the distinction which we think may be drawn fairly between the cases cited, and relied upon by the defendants in error, and the present case. It must be conceded that these clauses have especial application to a case like this. By the terms of this policy, concurrent insurance was expressly permitted, and at the time of the fire actually existed, to the amount of \$3,000. True, the loss is estimated at \$4,000 and upwards. But how was the company to know what was the amount of the concurrent insurance, or that the whole amount of the insurance did not exceed the total loss? In order, therefore, that the company might accurately ascertain the amount of their liability, under the policy, it was important that they should be furnished with what they had expressly provided for,—a statement of the amount of the other insurance. And, further, that the company might intelligently exercise the option to rebuild, it was equally important that they should have, what it was the undoubted duty of the assured to supply, the plans and specifications of the property destroyed. The loss was not payable for sixty days after such statements were made and furnished to the company, and the contract was accepted expressly subject to the performance of these conditions. It follows that no suit could be brought until the conditions were complied with, nor for sixty days thereafter, which time the company reserved, after the extent of their liability could be determined from the proofs either to pay the money, or to give notice of their option to replace the property.

Proofs were made, however, and furnished to the company, on the twenty-eighth March, 1885. They would appear to have been furnished in compliance with a suggestion from the secretary of the company, in writing, dated February 20, 1885, in which he calls the attention of the assured to condition 10 of the policy, and says: "As soon as we receive the necessary proofs, in accordance with the requirements of our policy, we can determine whether we owe you anything, and if so, how much." The sixty days, it will be observed, had then fully expired; and if the proofs were afterwards promptly furnished, or within a reasonable time, in compliance with the secretary's suggestion and request, we think the company might well be supposed to have waived the previous delay. But the proofs which were furnished did not contain plans and specifications, as required. The assured does state therein "that he will furnish, whenever required by the said company, as full particulars as he can as to the construction of the building insured, its dimensions,

and condition at the time of said fire, and such additional information as shall be required by said company concerning said property; but, notwithstanding this averment of his willingness so to do, it is nevertheless true that he did not furnish the plans and specifications, as it was his plain duty to do. On receipt of these defective proofs, therefore, the company had the undoubted right to adhere to the requirements of the policy, and to reject the proofs, with notification to the assured, or return them for amendment, but the company was not bound to reject the proofs. The condition of the policy was inserted for the benefit of the company, and it was competent for the company to waive its provisions. The information necessary for the exercise of the option might be obtained elsewhere. But it is plain that the company had sixty days after the proofs as made were furnished, or after the making of the amended proofs, as the case may be, in which to decide whether they would rebuild or pay the money.

The proofs were furnished, as we have said, on the twenty-eighth March, 1885, and suit was brought on the seventeenth April, thereafter. In this interval the proofs remained with the company. No objection was made either to the form or substance thereof. It was not until August 24, 1885, that the company in any way indicated their disapproval. It cannot be doubted that the proofs were intended as a substantial compliance with the conditions of the policy. "If they had been rejected, and notice given to the assured, or if they had been returned, with the reasons for non-acceptance, more complete proofs would doubtless have been furnished; the assured having averred his willingness to furnish the fullest information on this point 'whenever required by the company.'" The proofs of loss were but conditions precedent to the bringing of an action, and not of the insurance, and we think, under the circumstances, it might well be inferred that the company had waived the production of the plans and specifications. But this would not deprive the company of the time stipulated in which to obtain the information elsewhere. They had sixty days in which to decide, and the suit, having been brought within that time, was premature. The alias summons was, of course, but a continuance of the original.

The judgment is reversed.

SUPREME COURT OF WISCONSIN.

Appeal from Circuit Court, Brown County.

CAYON

vs.

DWELLING-HOUSE INS. CO. OF BOSTON, MASS.* }

A jury found that the insured knowingly and intentionally overstated the amount of loss in his proofs, but not with intent to deceive or defraud.

Held, That such overstatement was no defense to the action under the Wisconsin valued-policy law which allows the amount insured to be taken as the measure of damages.

Where the proofs required the certificate of the nearest magistrate,

Held, That the certificate of a notary is not a compliance, but its acceptance and retention without objection is a waiver of the defect.

An answer admitted for a particular purpose only cannot be used for any other purpose.

VROMAN & SALE, *for Respondent.*

ELLIS, GREEN & MERRILL, *for Appellant.*

ORTON, J.

The defenses to this action on the policy of insurance, set up in the answer, are as follows: (1) That the fire and loss occurred or were caused by the willful act and procurement of the plaintiff; (2) that the plaintiff fraudulently concealed the fact that the building or dwelling-house to be insured was and had been used as a cooper-shop; (3) that the plaintiff in his proofs of loss fraudulently overestimated the value of the property insured; and (4) that there was not annexed to the proofs of loss the certificate of a magistrate nearest to said fire, as required by the policy. The first and second defenses were negatived by the findings of the jury, and such findings were clearly warranted by the evidence. As to the third defense, the jury found that the plaintiff "knowingly and intention-

* Decision rendered, March 22, 1887.

ally stated in the proofs of loss the amount of loss and damage greater than it actually was," but "not with intent to deceive or defraud the defendant." It is ingeniously argued by the learned counsel of the appellant that, these findings being contradictory, the first shall prevail, and the second be rejected. Why not reverse the proposition, and reject the first, by the rule that a later statute repeals an earlier one, or the last judgment reconsiders and reverses or overrules a former one? But are these two findings repugnant to each other? It is plausibly argued by the learned counsel that knowingly and intentionally stating the amount of the loss greater than it actually was must have been with intent to deceive or defraud. The jury may have thought that the first finding (which was previously prepared for them by the court or counsel) meant that the plaintiff knowingly and intentionally stated the amount of the loss, which they now found, to be greater than it actually was; in other words, that such statement of the amount was his best and honest judgment, but it was greater than it actually was. The language is peculiar. It would not seem to mean that the plaintiff knowingly and intentionally overestimated the value of the property or the amount of the loss. But be this as it may, the first finding on this question comes short of such a fraud as affected the validity of the policy, or the plaintiff's right to the stipulated amount to be paid in case of total loss. The policy covered the building and its contents, and the controversy is mainly concerning the building alone, which was totally destroyed by the fire. In such a case the actual amount of the loss was immaterial, by virtue of the statute (section 1,943, Rev. St.), which provides that the amount of insurance written in the policy on the real property destroyed "shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and measure of damages when destroyed." In view of this statute (chapter 347, Laws 1874), it was held in *Thompson vs. St. Louis Ins. Co.* (43 Wis., 462), that the complaint need not state the value of the property when it was destroyed; and in *Reilly vs. Insurance Co.*, (id. 449), that a defense in the answer that the value of the property destroyed was less than that stated in the policy could not prevail against this statute; and in *Bammessel vs. Insurance Co.* (id., 463), where the policy contained a provision that "all fraud, or attempt at fraud, by false swearing or otherwise, should cause a forfeiture of all claim under the policy, that such a defense, in respect to the value of the property when destroyed, could not be made. In these cases, the chief justice, in his opinions, considered

every view which could even plausibly be taken against the full effect of the statute, and reviewed the authorities claimed to have force against its application, and the question should have been taken as settled and disposed of during the existence of the statute.

It is not perceived how the company could have been influenced by any such overestimate to settle or compromise, or not to settle or compromise, the claim for the insurance so fixed conclusively by the statute; for in no case could the company be compelled to pay more, or could the insured be induced thereby to receive less, than the amount so fixed by law. In this case the agent of the company required of the insured no statement whatever previous to the issuing of the policy, and he made his own examination of the property, and its estimate of its value. The authorities cited by the learned counsel of the appellant do not seem to have any application to this case under our statute; and the circumstances in which such an issue might be claimed to be sometimes material, notwithstanding the statute, are not present in this case. This defense, therefore, cannot prevail under any construction of the finding of an overestimated of the value or loss.

But, within this defense, it is contended that the evidence showed the existence of a \$50 mortgage upon the property when insured and when destroyed, and that such mortgage was not mentioned in the proofs of loss, but fraudulently concealed. The only proof of the existence of any such mortgage, or the particulars thereof, appears to have been as follows: The plaintiff was asked on cross-examination as a witness whether "there was a mortgage on his house at the time of the insurance and of the fire." This question was objected to by plaintiff's counsel, and the judge said: "I don't think it would cut any figure in the case." The counsel of the plaintiff then said: "I will withdraw the objection to its not being cross-examination if it is simply to be admitted as to the motive this man had." The plaintiff as a witness thereupon answered, "Yes, sir." It was then stipulated that the amount of the mortgage was \$50, dated April 3, 1884, from T. Cayon to Manuel Brunette; and the witness then said: "There was a mortgage on the house for \$50, with 10 per cent interest from the date of the note. The agreement between [him] and Mr. Brunette was that the interest was due when the mortgage was due, and that was two years." It is contended by the learned counsel of the respondent that this evidence of the mortgage was limited in its effect to the motive of the plaintiff on the charge of his having burned the building, and that

the evidence, having been received for this specific purpose, cannot be used for any other purpose in the case. It would seem, from the strong intimation of the court that the evidence was immaterial, that it would have been rejected for all purposes had not the plaintiff's counsel withdrawn his objection to it, upon the condition that it should be used only as to the plaintiff's motive to burn the building. When the evidence was received, therefore, it was received for that purpose only. In such case the rule established in *Hiles vs. Insurance Co.* (65 Wis., 585, 27 N. W. Rep., 348) would seem to limit the use of this evidence to such purpose. This was an affirmative defense that ought to have been set out in the answer as notice to the plaintiff. It not having been disclosed by the answer or otherwise, neither the court nor the counsel of the plaintiff could know the object of the evidence or its materiality, and it would be an unwarrantable surprise to now treat it as in the case generally and for all purposes. Had not the fact of the existence of this mortgage been so limited as evidence, and had the plaintiff's counsel known that it would be used to diminish the loss, or to show a fraudulent concealment of an incumbrance, perhaps it might have been shown that the agent of the company knew of its existence before the insurance, or some other rebutting evidence might have been given to render the fact harmless to the plaintiff. But it is sufficient to answer the rule that this evidence was so conditionally received. The plaintiff, as the insured had made no statements or representations whatever as to incumbrances on the property, and was not questioned concerning any before the policy was issued, and it is not perceived how this \$50 mortgage could "cut any figure in the case," as stated by the learned judge before whom the case was tried. The plaintiff, as mortgagor, in this State, was the absolute owner of the property, and had an insurable interest, to the extent of its value, notwithstanding the mortgage, as we understand the law: *May, Ins.* §§ 82, 285, and case cited in note 4. But this we do not positively decide, for we do not think the question arises properly in this case from the evidence as received.

The fourth defense consists in the failure of the plaintiff to furnish proofs of loss, with the proper certificate of a magistrate annexed, as a condition precedent to a recovery, or of any claim due or payable. The policy required the assured to "furnish and annex to the proofs a certificate of a magistrate nearest the place of fire, who is not a creditor or relative of the assured, that he has investigated the facts of the case, and that the claim is just and honest," and provided that "until

such * * * certificate shall be furnished * * * the claim shall not be due or payable." The certificate annexed to the proofs of loss was that of L. B. Sale, Esq., notary public. There was proof that L. B. Sale, Esq., was not the nearest magistrate to the fire, and there was no proof that he was. But the first and paramount objection to the certificate consists in the fact that he was not a magistrate. In the narrower sense in which the term is used, and in which it must have been used in the policy, it means "an inferior judicial officer, as a justice of the peace." The fact that the officer must be a magistrate nearest the place of the fire would seem to indicate that a justice of the peace was the officer intended; for his office and place of business are local and fixed, and he is one of a class of magistrates. In common parlance, a justice of the peace is a magistrate, and is often called by that name. Bouvier's and Rapalje & Lawrence's Law Dictionaries and Webster's Dictionary agreed upon this limited use of the term. The president of the United States and governors of the States are called magistrates, but they are chief magistrates, and of course not intended. One thing is very certain, a notary public is not a magistrate, and is never called a magistrate. It follows, therefore, that the proofs of loss in this case had not the proper certificate of a magistrate annexed to them, as required by the policy. The proofs of loss, otherwise proper, were furnished to the company in proper time, and were kept by the company without objection until the trial. If they were defective for want of a proper certificate, they should have been returned for that reason at once, so that the proper certificate could be obtained. Retaining them without objection constitutes a waiver of any such objectionable defects. This has been so often decided by this court that we need not look elsewhere for authority: *Warner vs. Peoria Ins. Co.*, 14 Wis., 318; *Killips vs. Putnam Ins. Co.*, 28 Wis., 480; *O'Conner vs. Hartford Ins. Co.*, 31 Wis., 165; *Badger vs. Glens Falls Ins. Co.*, 49 Wis., 389, 5 N. W. Rep., 845; *Badger vs. Phoenix Ins. Co.*, 49 Wis., 396, 5 N. W. Rep., 848. The learned counsel of the appellant seems to have relied upon other defects in the certificate which were not known to the company. But this defect, which is paramount and palpable, the company are presumed to have known. It would be quite immaterial whether Mr. Sale, the notary, was nearest the fire or not, for he was not a magistrate.

We can find no errors in the record which ought to reverse the judgment. The judgment of the circuit court is affirmed.

SUPREME COURT OF PENNSYLVANIA.

Error to Common Pleas, Lehigh County.

SUSQUEHANNA MUT. FIRE INS. CO. }

vs. }

GACKENBACH AND ANOTHER.*

When the charter of mutual insurance company provides that, in an action for the recovery of assessments, the certificate of the secretary shall be prima facie evidence of the assessment and amount due, the burden is on the defendant to show that the assessment is invalid for fraud or gross mistake. In the absence of such provision in the charter or in the statute relating to such companies, the company is bound to prove the facts establishing the claim.

In fixing the amounts to be assessed upon the members for losses incurred by a mutual insurance company, a reasonable amount may be included for expenses and insolvency of members. If the plaintiff in an action to recover an assessment proves its claim without showing so large an excess in the assessment as in itself satisfies the jury of fraud or gross mistake, it is entitled to recover. The burden of showing fraud or misconduct is on the defendant when he relies on that as a defense.

Where the defendant files an affidavit under the Pennsylvania act of May 1, 1876, § 56 (P. L. 53), the plaintiff is bound to prove its claim as if the statutory provision relative to the certificate had not been enacted.

By-laws of a mutual insurance company are part of the contract of insurance, and the directors have no right to make an assessment on any basis other than there set out.

Where an assignment of error raises a question in regard to the ruling of the lower court, if that ruling is free from error it must be affirmed, although the court gave as reasons for its decision grounds other than the correct one.

Three actions of assumpsit by the Susquehanna Mutual Fire Insurance Company against Charles W. Gackenbach and George Seislove, trading as Gackenbach & Seislove, to recover the amount

* Decision rendered, Mar. 21, 1887.—From *Atlantic Reporter*.

of assessment during the period of time the policy of defendants' was in force.

On March 17, 1879, the defendants made application for a policy of insurance in the company plaintiff for \$2,000, policy to be issued subject to the conditions contained in the application, and the constitution and by-laws of the company. The policy was issued March 19, 1879. On October 4, 1882, the policy was surrendered to the company and canceled. By the terms and conditions of the application and policy, and the constitution and by-laws of the company, the insured became liable to assessments for losses incurred by the company during the period of time their policy was in force. Losses having been incurred, the board of directors of the company made four assessments, the defendants' assessment being No. 9, \$30; No. 10, \$20; No. 11, \$57.50; and No. 12, \$40. As soon as these assessments were made, notice thereof was sent the defendants in accordance with the provisions of the by-laws of the company, and payment demanded, and, on the defendants refusing to pay, these suits were brought. Before trial the defendants filed affidavits under the provisions of section 56 of the act of Assembly of May 1, 1876. At the trial the plaintiff contended that, the plaintiff being a mutual insurance company, the directors, in making these assessments, might exercise a reasonable discretion in fixing the amount to be raised, and that the assessments so made were presumed not to be excessive until the contrary was shown; that the burden was upon the defendants to show that these assessments were so excessive as to be evidence of fraud or gross negligence; that there was no evidence from which the jury could find that these assessments were excessive; and that under all the evidence the verdicts should be for the plaintiff. Points to this effect were put to the court, and the court was asked to so instruct the jury. The court negatived these several points, submitted the cases to the jury, and instructed the jury that the burden was upon the plaintiff to show that these assessments were not excessive and not fraudulent. Verdict and judgment for defendants, whereupon plaintiff took this writ.

JOHN RUPP, THOS. B. METZGER, and G. W. VAN FOSSEN, *for Plaintiff in Error.*

Defendants are liable for these assessments under their policy: Insurance Co. vs. Hartshorne, 90 Pa. St., 465; Akers vs. Hite, 94 Pa. St., 394; Wilson vs. Insurance Co., 19 Pa. St., 372. The direct-

ors, in making the assessments, may include an allowance for expenses and losses: *Rosenberger vs. Insurance Co.*, 87 Pa. St., 207; *Jones vs. Sisson*, 6 Gray, 288. Assessments are presumed to be fairly made, and are binding until fraud or gross mistake is shown: *Hummel's Appeal*, 78 Pa. St., 320; *Buckley vs. Insurance Co.*, 92 Pa. St., 501; *Rosenberger vs. Insurance Co.*, *supra*.

HENNINGER & DEWALT, D. D. ROPER, and EDWARD HARVEY, for Defendants in Error.

Plaintiff must affirmatively show that the losses have been incurred, and that the assessments are legally made: *May, Ins.* (2d Ed.), § 557; *Insurance Co. vs. Guse*, 49 Mo., 329; *Insurance Co. vs. Schmdt*, 19 Iowa, 502; *Insurance Co. vs. Fitzpatrick*, 2 Gray, 279; *Bliss, Ins.* (2d Ed.), § 428; *Thomas vs. Whallon*, 31 Barb., 172.

TRUNKY, J.

When the charter of a mutual insurance company provides that, in an action for the recovery of the assessment, the certificate of the secretary of the company shall be prima facie evidence of the assessment, and the amount due, the burden is on the defendant to show that the assessment is invalid for fraud or gross mistake: *Insurance Co. vs. Buckley*, 83 Pa. St., 298; *Buckley vs. Insurance Co.*, 92 Pa. St., 501. In absence of such provision in the charter or in the statute relating to such companies, the company is bound to prove the facts establishing the claim. The burden was on the plaintiff to show liabilities which made an assessment necessary, and that it was made according to the terms of the charter and by-laws. A reasonable amount may be included in the assessment for expenses, and for losses likely to occur by reason of insolvency of members of the company. If the plaintiff proves its claim without showing so large an excess in the assessment as in itself satisfies the jury of fraud or gross mistake, it is entitled to recover, unless the defendant adduces evidence of matter which defeats the action. There is no presumption that the officers committed fraud or gross mistake; the presumption is that they acted honestly, and with reasonable skill. The burden of showing fraud or misconduct is on the defendant when he relies upon that as a defense: *Rosenberger vs. Insurance Co.*, 87 Pa. St., 207.

The affidavit filed by the defendant precluded the use by the plaintiff of the certificate as evidence, and the plaintiff was bound to prove its claim as if the statutory provision relative to the certificate had not been enacted. The learned judge of the common

pleas charged that the assessment had been shown to be legal, and that the plaintiff "must prove that there were losses for which the company was liable, and must then show that an assessment was made, and that the defendants' share of the losses thus sought to be provided for in the assessment was their just share." In accord with that instruction were the plaintiff's first and second points, and they ought to have been affirmed. They are as follows: "First. The board of directors of a mutual insurance company, in making assessments, may exercise a reasonable discretion in fixing the amount to be raised, and an assessment so made is presumed not to be excessive until the contrary is shown. Second. The burden is upon the defendants in these cases to show that the assessments for which these suits are brought are so excessive as to be in themselves evidence of fraud or gross negligence."

If it was the misfortune of the plaintiff, in the attempt to establish its claim, to put in evidence a fact which would defeat recovery, that does not change the law of evidence. The defendant may avail of that fact, or evidence tending to show it; but whatever the evidence relied on to establish fraud, or other matter affirmed to defeat the claim, the burden is on the defendant. The presumption that the officers whose duty it was to make the assessment acted with due care and fidelity stands until overcome by sufficient proof. The rule is the same where the defendant relies on the testimony on part of the plaintiff as when upon his own.

None of the remaining assignments of error, except the tenth, need be remarked; for there is no error in the instructions therein complained of save that resulting from the refusal of the plaintiff's first and second points. The tenth assignment is to the ruling of the court that the action No. 153 was not supported by any evidence. One of the by-laws provides "that all members whose policies are in force at the time the assessment may be declared, shall be liable to assessment for all losses adjusted properly and unpaid; and all other liabilities then existing against the company shall be subject to abatement as hereinafter specified. All members whose policies have expired, and are not in force at the time such assessment is declared, shall nevertheless be liable to assessment for all unpaid losses and other liabilities which existed at the time of the expiration of such policy or policies, pro rata with those then in force, and the amount thus ascertained and levied upon such policies to be deducted from the gross amount of liabilities of the company, for which

such assessment is to be made, and the balance of liabilities remaining to be assessed upon the policies then in force."

This by-law is part of the contract of insurance, and plainly designates what members are liable to be assessed for losses at the time the assessment may be declared. All are liable whose policies are in force, and all are liable whose policies have expired for unpaid losses which existed at the time of the expiration. It is competent for the members to so contract, and the directors have no right to make an assessment on another basis. Decisions in cases where the contract contained no similar provision do not apply. Were this by-law not in the contract, the authorities cited by the plaintiff would sustain the contention that members are liable "to assessments for the payment of all losses and debts incurred by the company during the time their policy was in force, but not for any losses or liabilities incurred either before they obtained their policy, or after its expiration or cancellation." The plaintiff concedes that the policies in force at the time the assessment was declared which were not in force at the time the losses and liabilities were incurred, were not included in the assessments. Its secretary, called to prove the claim, testified that there were a large number of such policies, and that they were not included. It follows that assessment No. 9 was invalid, and that the court rightly ruled that the plaintiff could not recover.

The ruling may have been based on other grounds; yet, being free of error, it must be affirmed. In effect, the jury were instructed that the plaintiff had failed to adduce evidence to establish its claim. That the court erred in refusing the plaintiff's first and second points as propositions did the plaintiff no injury; for the court could properly have ordered a nonsuit, or have directed a verdict for the defendant, without answering any proposition.

In two of the cases no assignment of error raises the question whether the plaintiff's evidence was sufficient to submit to the jury. The defendants urge that, if it be conceded that the court erred in answering the plaintiff's points, it does not follow that the judgment should be reversed. But no precedent is cited for going outside the assignments which must be sustained for a cause to ground a refusal of reversal. Where an assignment reveals a fatal defect in the case of the plaintiff in error, he shows cause for affirmance of the judgment.

Judgment affirmed No. 153, January term, 1885. In each of the other causes, judgment reversed, and venire facias de novo awarded.

SUPREME COURT OF PENNSYLVANIA.

Error to the Court of Common Pleas of Berks County.

GRANT'S ADMINISTRATORS

vs.

KLINE.*

G. was indebted to his brother-in-law, K., to the amount of \$743.56, and took out a policy for \$3,000 for the benefit of K., the latter paying the premiums and the transaction being in good faith.

Held, That the disproportion between the amount of the policy and the debt was not so great as to make it a wagering contract, and K. having received the amount of the policy, the administrators of G. were not entitled to recover from him the excess above the actual indebtedness.

Held, That a declaration by G. that he had given K. a policy on his life, and that after his death he could realize what G. had got from him, was not conclusive that the policy was intended simply as a collateral security.

Statement of Case.

A certificate of membership was issued by the U. B. Mutual Aid Society to Bertolet Grant for \$3,000 for the benefit of his brother-in-law and creditor, Jacob Kline. Upon the death of the insured in the following year the amount of the certificate, less the society's discount of \$200, was paid to Kline, and this suit was brought by the administrators of Grant to recover the excess above any indebtedness of Grant to Kline on the ground that the disproportion was so great between the debt and sum insured as to make it a wagering contract. Kline proved that the transaction was in good faith, and that Grant was indebted to him on a judgment, promissory

* Opinion filed, March 21, 1887.

note, and for premiums on abandoned policies to the amount of \$743.56.

Messrs. RICHARD L. JONES and ADAM H. SCHMEHL, *for Plaintiff in Error.*

Messrs. J. H. JACOBS, HENRY C. G. REBER, and H. P. KEISER, *Contra.*

PAXSON, J.

The second assignment presents the controlling point in this case. It alleges that the court below erred in not affirming the plaintiff's first point. The point was as follows: "The disproportion of the debts of \$214 alleged to have been owing by Grant to Kline at the time of the insurance, and the amount of insurance, viz.: \$3,000, is so great as to make it merely a wagering policy, and such policy being void in law, the defendant is not entitled to hold the proceeds of the policy, and the verdict must be for the plaintiff for the amount received by the defendant, less the assessments paid and the debt proved."

This point assumes the amount of the debts due Kline from Grant, but as the plaintiff's fourth point, which is free from this objection, and was also declined, raises the same question, we will consider it as if no such defect existed.

It is very clear, if the testimony in the case is to be believed, that the policy in question was taken out by Mr. Grant and assigned to Kline in entire good faith. There is nothing to cast suspicion upon the integrity of the transaction. I will refer to the disproportion of the debt to the amount insured hereafter. I am now alluding to the good faith of the parties as distinguished from the gambling policies in *Gilbert vs. Moose* (104 Pa., St., 14) and that line of cases. Kline and Grant were brothers-in-law, and it appears that Kline had befriended Grant in various ways, and had from time to time loaned him money. The latter said when he applied for the policy that "he was greatly indebted to Mr. Kline; that he had favored him considerably." Also that Grant said: "Jacob Kline was a brother-in-law of his, and he owed him a debt, a considerable amount of a debt, and he said he wanted to pay him and this was the only way. The only remedy which he had, otherwise he could never pay him. For this reason he took out the policy in favor of Mr. Kline to pay his debt." (See testimony of Joseph Deysher.) Another witness, John Zerbe, also states that Grant told him that Kline was the best friend he ever had; had never refused him any favors whatever; had given considerable money; that he (Grant) had given Kline a policy of insurance on his life, etc.

After the death of Mr. Grant, the company paid over the money to Mr. Kline, and this suit was brought by the administrators of Grant to recover it back, less the amount of the actual debt, and the premiums paid on this policy by Kline. There was no evidence to submit to the jury that the policy was given as collateral security; the premiums were all paid by Kline; hence if the plaintiff can recover at all it can only be because the policy in question is a gambling or wagering policy.

It was not disputed at the trial below that there was a bona fide indebtedness of Grant to Kline at the time the policy was taken out of something over \$500. It was also in evidence that one or more policies had been taken out on Grant's life for Kline's benefit prior to the policy in question. These policies had been abandoned because of the insolvency of the companies or other sufficient reason. Kline had paid in premiums thereon several hundred dollars. While the money thus fruitlessly paid in premiums may not have amounted to an insurable interest in the life of Grant, for the reason that such payments did not make him a creditor for their amount, we think they show good faith in the transaction. This case is to be determined upon the facts as they existed at the time the last policy was taken out, and if both Grant and Kline saw proper to treat the premiums paid as an insurable interest, Grant's administrators have no standing to say they were not. The company could have defended upon this ground, but it did not. It paid the money over to Kline without question.

This brings us to the main question, was the amount of insurance so disproportioned to Kline's interest in the life of Grant as to make this a wagering policy? We approach this question with caution, the more so that this court has not yet laid down a rule upon this subject. That we shall be compelled some day to do so is possible. We have said that the sum insured must not be disproportioned to the interest the holder of the policy has in the life insured. To take out a policy of \$5,000 to secure a debt of five dollars would be such a palpable wager that no court would hesitate to declare it so as a matter of law. Care must be taken also, that a debt shall not be collusively contracted for the mere purpose of creating an insurable interest. Mr. Dickens in his inimitable "Pickwick Papers" has shown how a debt may be created for the purpose of lodging the debtor in prison by collusion with the creditor. Speaking for myself, it may be that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the

debt with interest, and the amount of premiums with interest thereon during the expectancy of life as shown by the Carlisle tables. This view, however, has never yet been adopted by this court in any adjudicated case, nor do we feel compelled to define the disproportion now in view of the particular facts of the case in hand. We do not regard it as either immoral or wagering for Kline to attempt to secure the sums he had already fruitlessly paid in premiums on Grant's life, and if Grant had no objection thereto, and assisted him therein, I do not see that any one could object to this but the company. Again, we have the declarations of Grant that he owed Kline a considerable sum of money—the precise amount not stated—that Kline had aided him in various ways; had never refused him a favor, etc. In view of their connection by marriage and of their admitted relations, it is at least probable that Kline had aided him at many times, and in various ways pecuniarily that are not represented by any evidences of debt. And if the sum insured was regarded by Grant as a reasonable amount to indemnify Kline, with what grace can Grant's administrators come in and allege that it was not. They have no possible equity; Grant never paid one dollar of the premium, and if they are allowed now to recover, it is not by virtue of any equity, but by force of an inexorable rule of public policy which treats it as a wagering policy and declares the policy-holder a trustee for the person insured as to the entire proceeds save only the money actually loaned, with the premiums paid.

Assuming, then, that Kline might with Grant's consent and as against his administrators lawfully seek to indemnify himself for the premiums paid and lost, we have the sum of \$743.56 as the amount which Kline was out of pocket. We do not know what Grant's expectancy of life was when the policy was taken out, and there is nothing before us upon which we could base any reliable opinion. But it appears he was sixty-five years of age, and was an unusually good risk. While we do not know what the amount of the annual premium was, we do know that it must have been a considerable sum on \$3,000 for a man of sixty-five years, and with the annual interest would roll up rapidly. That Grant died within a year is not to the purpose; he might have lived long enough for the debt and premiums at compound interest to have exceeded the amount of the policy; surely, in such case we cannot say as a matter of law that the disproportion was so great as to make it a wagering policy.

We see no error in refusing to affirm the point referred to in the sixth assignment. We do not think the declarations of Grant embodied in the point are conclusive that the policy was intended as collateral security merely, and that the amount of the policy, less debt and premiums, was to be paid over to Grant. On the contrary, they would not have justified such finding by the jury. Everything in the case indicated that this was intended as a creditor's policy in which Grant had no interest. As before observed, the latter paid no premiums.

The evidence referred to in the seventh assignment was properly admitted, if, for no other reason, to show good faith. But, as has been already said, it was competent to show these payments of premiums for other purposes. Judgment affirmed.

SUPREME COURT OF PENNSYLVANIA.

Error to Common Pleas, Somerset County.

COMMERCIAL UNION ASSUR. CO. }

vs. }

HOCKING.* }

An insurance company which receives proofs of loss when offered, refers them to its adjuster, and retains them, without objection or complaint, for five months, will be held to waive a compliance with the conditions of the policy, even though the proofs were not made within the time nor in the form required by the policy.

When the parties to an executory contract agree that all questions of difference or dispute which may arise between them in reference thereto, or that the amount of any claim arising therefrom, shall be first submitted to the arbitrament of a single individual or tribunal named, they are bound by their contract, and cannot seek redress elsewhere, until the arbiter agreed upon has been discharged, either by the rendition of an award or otherwise. But, where the contract does not provide for submitting matters in dispute to any particular person or tribunal named, but to one or more persons to be mutually chosen by the parties, it is revocable by either party, and such a provision is not adequate to oust the jurisdiction of the courts having cognizance of the subject-matter of the dispute. Nor is the applicability of this principle disturbed by a provision in the contract that no suit should be brought until after the award of the arbitrators shall have been filed.

Assumpsit by George H. Hocking against the Commercial Union Assurance Company of London upon a policy of fire insurance for \$1,000. The facts are sufficiently stated in the opinion. Verdict for plaintiff, \$1,100.66, and judgment thereon; whereupon defendant took this writ.

* Decision rendered, March 7, 1887.—From *Atlantic Reporter*.

W. H. KOONTZ, for Plaintiff in Error.

Under the terms of the policy, arbitrators had been chosen, and until their award was filed no action could be brought. The defendant has done nothing to estop it from setting up the defect in the notice, nor the delay in sending the same. See argument in *German-American Ins. Co. vs. Hocking*, ante, 586.

COFFROTH & RUPPEL, for Defendant in Error.

Defendant has waived the defect in the notice and the delay in sending the same : *Insurance Co. vs. Shreffler*, 42 Pa. St., 188; *Same vs. Schollenberger*, 44 Pa. St., 259; *Insurance Co. vs. Taylor*, 73 Pa. St., 342; *Insurance Co. vs. Todd*, 83 Pa. St., 272; *Insurance Co. vs. Cochran*, 88 Pa. St., 230; *Insurance Co. vs. Moyer*, 97 Pa. St., 441; *Insurance Co. vs. Davis*, 98 Pa. St., 280; *Insurance Co. vs. Flynn*, id., 627; *Insurance Co. vs. Staats*, 102 Pa. St., 529; *Insurance Co. vs. Dougherty*, id., 568. It was beyond the power of the company to supplant the court by a tribunal of its own selection. See argument in *German-American Ins. Co. vs. Hocking*, supra.

CLARK, J.

The policy in suit was issued December 1, 1884, by the Commercial Union Assurance Company, to George H. Hocking, in the sum of \$1,000 for one year from the date thereof, on his two-story, frame building, etc., in Meyersdale, Pennsylvania, with the privilege of other insurance. When the policy issued, Hocking held a policy of the Howard Insurance Company of New York, for \$2,000, dated November 24, 1884, on the same building, and afterwards, on the 3d December, 1884, obtained a policy of the German-American Insurance Company in the sum of \$1,000; making the total insurance \$4,000, all of which was in full force on the fourth day of December, 1884, when the building was destroyed by fire.

The policy required that persons sustaining loss or damage should forthwith give notice of said loss to the company, and, within sixty days, render a particular account of such loss, etc., stating certain specific matters of proof affecting the extent of the defendant's liability. Notice of the loss was promptly given as required, but the proofs were not furnished within sixty days. The plaintiff's contention was that, as there was but a single subject of insurance, the loss total, and the notice to that effect, no further proof was necessary. But, applying the principles laid down in *German Ins. Co. vs. Hocking*, ante, 586, which was argued with the case at bar, it is plain that the company, under the special terms of their policy, had the

undoubted right to have furnished to them proofs of certain matters according to the conditions of the contract. These proofs were furnished, and there is no substantial objection made, we think, either to their form or substance; but it is contended that as the loss occurred on December 4, 1884, and the proofs were not furnished until March 28, 1885, more than sixty days intervening, they were not in time, and the company was not bound to receive them. But the company did receive them, referred them to their adjuster, and retained them, without objection or complaint on that or any other ground, from the twenty-eighth March, 1885, until the eighteenth August, 1885. If the company acted upon these proofs as having been received in time, and made no objection whatever until the trial, they would be presumed, we think, to have waived the objections which they now make: *Lycoming Ins. Co. vs. Schreffler*, 42 Pa. St., 188. The policy is not printed, but, as we understand it from the portions which are printed, the proofs of loss were but conditions precedent to the bringing of an action, and not of the insurance, and, if the delay in furnishing them was waived, the remedy still remained. It was the duty of the company, if the proofs were imperfect or out of time, if objected to on that ground, to make their objection known. It is true the policy provided that "no examination of the assured, nor investigation by the company, nor reference to nor award of arbitrators, shall operate as a waiver on part of the company of any of the provisions, conditions, or requirements of the policy respecting the making or filing of a particular account of loss," as therein provided; but the act of waiver to which we have given effect is not embraced in this provision.

The second ground of error alleged is that by the terms of the policy it is provided that, "in case differences shall arise respecting any loss or damage after proof thereof, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding," etc.; and as it is proven by the plaintiff that arbitrators were appointed who have not yet made their award, the plaintiff can have no right of action until that condition of the policy has been complied with. It is undoubtedly true when the parties to an executory contract agree that all questions of difference or dispute which may arise between them in reference thereto; or that the amount of any claim arising therefrom, shall be first submitted to the arbitrament of a single individual or tribunal named, they are bound by their contract, and cannot seek redress elsewhere, until the arbiter agreed upon has been dis-

charged, either by the rendition of an award or otherwise: *Monongahela Nav. Co. vs. Fenlon*, 4 Watts & S., 205; *Connor vs. Simpson*, 104 Pa. St., 440; *Hostetter vs. City of Pittsburgh*, 107 Pa. St., 419. But it is equally true that where the agreement in question does not provide for submitting matters in dispute to any particular person or tribunal named, but to one or more persons to be mutually chosen by the parties, it is revocable by either party, and such a provision is not adequate to oust the jurisdiction of the courts having cognizance of the subject-matter of the dispute: *Gray vs. Wilson*, 4 Watts, 41; *Mentz vs. Armenia Fire Ins. Co.*, 79 Pa. St., 480; *Hostetter vs. City of Pittsburgh*, *supra*. The applicability of this principle to the case in hand is not disturbed by the further special provision of the policy that "no suit or action against this company shall be sustainable in any court of law or chancery till after the award shall have been filed, fixing the amount of such claim," etc. In *Mentz vs. Armenia Co.*, *supra*, a precisely similar provision existed; and, referring to the effect of it, Mr. Justice Sharswood said: "If it were not in the power of the party to oust the courts of their general jurisdiction by such an agreement, that clause does not help them. Had a general arbitration clause been valid, it would have been a condition precedent to an action. Of itself, the provision in question is but the expression of that which was implied." Nor is the effect of the general arbitration clause in this contract affected by the fact that two arbitrators were in fact chosen. They failed to agree; both parties appear to have abandoned the proceeding; and the bringing of this suit was a plain revocation of the submission. We are of opinion, therefore, that the second assignment of error cannot be sustained.

We are clearly of opinion, however, that the suit was prematurely brought. The company, as we have said, had a right to insist upon the provision in the policy for the proofs of loss. They were not furnished until the twenty-eighth March, 1885. The company had thirty days thereafter in which to give notice of their intention to rebuild, and the loss was not payable in money, should the option not be exercised for sixty days, whereas the suit was brought on the seventeenth April, 1885. We will not discuss this branch of the case at length. The reasons are set forth in the opinion filed in the *German-American Ins. Co. vs. Hocking*, ante, 586, already referred to.

The judgment is reversed.

SUPREME COURT OF MICHIGAN.

Mandamus.

MINER

vs.

TRUSTEES OF MICHIGAN MUT. BEN. ASS'N
OF HILLSDALE.*

Where judgment has been obtained against a benefit association for the amount of a benefit due the widow of a member and execution is returned unsatisfied;

Held, That no further proceedings could be taken at law and an application for mandamus to compel an assessment which the company claims to be already making in good faith, must be denied. Further proceedings for sequestration if proper must be pursued in a court of equity under How. St., of Michigan.

LYONS & HECKLEMAN, *for Relator.*

AUSTIN BLAIR, *for Respondent.*

SHERWOOD, J.

The respondent is a mutual benefit association, organized under chapter 118, How. St.

Articles of association, and by-laws thereunder, were duly adopted, whereby the association was to continue 30 years, and locating its principal office for the transaction of business at the city of Hillsdale, in this State. The objects of the association, as stated in its articles, are as follows:—

Section 1. The object of this association shall be (1) to unite fraternally all persons of sound mind, in good health, and of temperate habits and good moral character, between the ages of twenty and sixty years of age.

* Decision rendered, February 10, 1887.

Sec. 2 (2c) To establish a benefit fund, from which, on the satisfactory evidence of the death of a member of this association who has complied with all its lawful requirements, a sum, not exceeding three thousand dollars, shall be paid to their family, or those dependent upon them, as they may direct.

Sec. 3. (3c) To secure to any surviving member in good standing a sum not exceeding three thousand dollars after a given length of time, or, in case of total disability of a member by the loss of their limbs, arms, or eyes, either by disease or accident, as provided by the by-laws, a certain sum of money in accordance with the by-laws regulating the same. Persons becoming members of this corporation may become full-rate members or half-rate members; provided, however, that, should a death occur when one full assessment on each member would not amount to three thousand dollars, then the sum paid shall be the amount of one full, or one-half of a full, assessment on each member in good standing at the date of such death, and such amount shall be all that can be claimed by any one. There shall be no classes in said corporation, except certain full-rate and half-rate members.

The revenues of the association are a membership fee of ten dollars, a medical-examination fee of one dollar, to be paid by each member when admitted, a per capita tax of three dollars per annum, and assessments levied in cases of deaths of members.

The relator in this case was a beneficiary in a policy or certificate issued by the defendant upon the application of Floyd W. Miner, her husband, dated the eighth day of October, 1883. By the terms of this certificate the applicant became a member of the defendant company, and, by complying with its provisions, was entitled to the benefits of the organization, and, in case of his death, the relator became entitled to have of the company a sum of money not exceeding \$3,000, to be determined under the terms of the articles of association and by-laws of the company, which constituted a part of the contract of insurance. Floyd W. Miner died about the fifth day of July, 1884. The respondent denied any liability to the relator under the certificate taken out by the deceased, whereupon the relator brought suit, in the circuit court for the county of Shiawassee, against the respondent, to determine the liability of the company, and received a judgment for the sum of \$3,106.17, and costs of suit. On appeal to this court, said judgment was affirmed on the twenty-eighth day of October, 1886: 29 N. W. Rep., 852. The relator caused execution to be issued upon said judgment, and the same was duly returned unsatisfied, on the twenty-seventh day of December, 1886, for want of property to levy upon.

On the seventeenth day of January, 1887, relator filed her petition in this court for mandamus, setting forth the foregoing facts, and

praying that a writ may issue to the board of trustees of the respondent company, requiring them to make an assessment upon all the members of the association, sufficient to pay said judgment, with the interest thereon and costs of suit, and that they pay said amounts to the relator, and that she may have such other order as may be just and equitable. The respondents make answer to the order to show cause, and say, among other things, that, when they were called upon to make payment of the judgment by the attorney for the relator, the company had no money with which to pay the same, and could not raise it except by an assessment upon the members of the association liable to be assessed for that purpose according to the articles of association and by-laws thereof, and that, under these, no one was entitled to receive the proceeds of more than one assessment upon the death of a member, and that the company has never refused to make an assessment, and pay the same to relator; that on the thirteenth day of December, 1886, a regular meeting of the trustees of the association was held to make an assessment upon all the members of the association liable to be assessed for the loss in consequence of which the relator claims, and that said assessment was made, and notice thereof given to the members assessed, according to the by-laws of the association, and the resolution making such assessment, and that the same is being carried forward in good faith, and that the said assessment is the only lawful one they can make for the payment of said claim; and the respondent relies upon the following paragraph contained in the articles of association, and which constitutes a part of every contract of insurance issued by the company, viz. :—

Persons becoming members of this corporation may become full-rate members or half-rate members; provided, however, that, should a death occur when one full assessment on each member would not amount to three thousand dollars, then the sum paid shall be the amount of one full or one-half of a full assessment on each member in good standing at the date of such death, and such amount shall be all that can be claimed by any one. There shall be no classes in said corporation, except between full-rate and half-rate members.

The following provision is contained in the statute (How. St., §8,153), viz. :—

Whenever a judgment at law or a decree in chancery shall be obtained against any corporation under the laws of this State, and an execution issued thereon shall have been returned unsatisfied in part or in whole, upon the petition of the person obtaining such judgment or decree, or his representatives, the circuit court within the proper county may sequester the stock,

property, things in action, and effects of such corporation, and may appoint a receiver of the same.

The respondent is a corporation existing under the laws of this State. The relator has obtained a judgment against the corporation, and execution has been returned unsatisfied. No further proceedings at law can be resorted to to enforce collection. Whether the corporation is solvent or insolvent cannot be made to appear until an investigation has been had. Whether the sequestration provided for under the statute is proper or not, or whether resort should be had to assessments to satisfy the relator's claim, are questions that cannot be properly considered upon this motion. They necessarily involve a construction of the statute under which respondent company is organized, and a construction of the articles of association, and the by-laws made thereunder as well; and that construction will, to a greater or less extent, be modified by the circumstances surrounding each particular case wherein it is sought to be applied. It is very manifest that mandamus is entirely inadequate in this class of cases, that equity alone can furnish the proper remedy. Sequestration can be had in no other court. The examination of the affairs of a corporation, and the legal proceeding by which its assets are taken and applied to the payment of its debts, are particularly subjects of equitable cognizance, and what acts should be done or performed by its officers in the payment of its debts can only be ascertained and enforced when the true situation of the corporation is fully known, and its ability to pay and means of payment are judicially established. A court of equity is the proper forum for such proceedings, and the writ in this case must therefore be denied. The other justices concurred.

SUPREME COURT OF MICHIGAN.

Error to the Superior Court of Detroit.

STREETER, ADM'R, ETC.,

vs.

WESTERN UNION MUT. LIFE ACCIDENT
SOCIETY OF U. S.*

The policy provided that it should be void if the insured died by his own hand, sane or insane.

Held, That unless the act was involuntary or the insured unconscious, his suicide while insane was not covered by the policy.

Evidence that the mental condition of the insured was such that he could not control his acts, based on observations previous to the suicide, is not evidence that the act was involuntary.

Such death cannot be deemed accidental within the policy because the insanity itself was the result of accident.

E. J. ENSIGN, *for Plaintiff and Appellant.*

GRIFFIN & WARNER, *for Defendant.*

CHAMPLIN, J.

The policy of insurance introduced in evidence in this cause, contained the following clause: "If the insured shall, within three years of the date of this policy, die by his own hand, sane or insane, this policy shall become null and void." Within three years from the date of the policy the insured died from the effects of a pistol-shot wound inflicted upon himself. The evidence tended to prove that when he shot himself he was insane. Witnesses expressed the opinion that his mental condition was such that he was unable to control

* Decision rendered, February 15, 1887.

any of his physical actions that might have been called upon to carry out any one of his impulses. It is not claimed that the self-destruction of the insured was accidental. The court below construed the language of policy above quoted as covering all acts of self-destruction, whether felonious or not, and was meant to excuse the company from liability when suicide was the result of insanity, and in itself an insane act; that the word "sane or insane," in this case, not only meant to qualify the meaning of "die by his own hand," as defined by law, but that they actually do so. Counsel for plaintiff contends that the phrase, "die by his own hand," had a well-understood signification in the law of insurance; that when the defendant insurance company selected such expression, and inserted it in its policy, it should be held to have used it in its legal sense, namely, as meaning, "shall voluntarily and intentionally take his own life;" that, by adding the words "sane or insane," the defendant had not caused the expression, "die by his own hand," to mean something which it did not mean without such addition, but had used a combined expression, which was tantamount to saying, "shall voluntarily and intentionally take his own life, sane or insane;" that if the expressions, "die by his own hand," and "sane or insane," were incongruous or inconsistent, the beneficiaries under the policy should not suffer by it; that in his opinion, however, they were not incongruous or inconsistent, but could legally and scientifically combine, and stand together without conflict, as both voluntary and involuntary self-killing were compatible with insanity.

We are unable to agree with the construction which the learned counsel for the plaintiff places upon the clause of the contract in question. The subject is not a new one in the courts. The precise question came before the United States Supreme Court in *Bigelow vs. Berkshire Life Ins. Co.* (93 U. S., 284), where Mr. Justice Davis, in an able and exhaustive opinion, so fully reviews the subject, and the construction to be placed upon the term "sane or insane," as to render a further discussion of the subject unnecessary. It has also received attention in the following cases: *De Gogorza vs. Knickerbocker Life Ins. Co.*, 65 N. Y., 232; *Pierce vs. Travelers' Ins. Co.*, 34 Wis., 389; *Salentine vs. Mutual Ben. Life Ins. Co.*, 24 Fed. Rep., 159; *Riley vs. Hartford Life and Annuity Ins. Co.*, 25 Fed. Rep., 315.

It was said by Mr. Justice Davis in *Bigelow vs. Insurance Co.*, supra, that "the policy was rendered void if the insured was con-

scious of the physical nature of his act, and intended by it to cause his death, although at the time he was incapable of judging between right and wrong, and of understanding the moral consequence of what he was doing." It was claimed in this case that, if the insured was unconscious of the act he was committing, it was merely an accident, and was not within the intent and meaning of the terms of the policy. But the learned judge said that the term, "wholly unconscious of the act," refers to the real nature and character of the act as a crime, and not to the act itself. He further said that "Bigelow knew he was taking his own life, and showed sufficient intelligence to employ a loaded pistol to accomplish his purpose; but he was unconscious of the great crime he was committing. His darkened mind did not enable him to see or appreciate the moral character of act, but still left him capacity enough to understand its physical nature and consequences."

If a person does an act in a state of unconsciousness, or involuntarily, whether he be sane or insane, such act is nothing more nor less than accidental, and would not operate to forfeit the policy. The record in this case does not disclose such a state of facts. There was no evidence that the act was involuntary, or that Mower was unconscious when he inflicted upon himself the fatal wound. The only testimony which can be claimed to have any bearing upon the subject is that given in answer to questions calling for the opinion of the witnesses as to whether Mower's insane mental condition affected his ability to control his own physical actions. These witnesses did not claim to have been present at the time, or to have been acquainted with the circumstances of the transaction, but they based their opinion upon what they had observed of his mental condition previous to the act of self-destruction. Such testimony was entirely destitute of any probative quality. The court was right in disregarding it. The same point was passed upon in *De Gogorza vs. Knickerbocker Life Ins. Co.*, *supra*. The policy covers all conscious acts of the insured by which death by his own hand is compassed, whether he was at the time sane or insane. If the act was done for the purpose of self-destruction, it matters not that the insured had no conception of the wrong involved in its commission. Upon the facts presented by this record, the charge of the trial judge was correct.

Error is assigned that the court did not permit the witness Clara M. Mower to testify in relation to conversations with Samuel C. Mower concerning his fall. This assignment is founded upon a mistake. The court did permit the witness to testify fully as to what

her husband said. She testified to what complaints he made, and also to what he said.

It is also assigned as error that the court refused to permit the plaintiff to go to the jury upon the question of how far the accident alluded to in the testimony produced the condition of mind resulting in the killing. There were no requests to charge presented to the court by either party. Some testimony was introduced tending to show that, about six weeks before the insured shot himself, he fell upon the sidewalk, and received an injury at the base of the brain; and several witnesses testified that, after that time, they observed a marked change in his demeanor, and that he complained of pain in the back of his head, and they attributed his insanity to his fall. He shot himself April 10, 1885. But one witness, Mr. Stanly Stout, testifies to his strange and unnatural demeanor in the fall of 1884; that he never seemed to know exactly what he was about, or to have control of his faculties,—sitting silent and moody, and lingering for hours at a time, while constantly professing to be in haste. He does not remember any particular change in his manner or actions shortly before his death. So that his fall seems not to have been the producing cause of his insanity, but may have had an accelerating effect upon the predisposing cause. Granting, however, that it was the producing cause of his insanity, and by reason of his insanity he purposely took his own life, it does not logically follow that the suicide or self-destruction was caused by the accidental fall and injury. The cause and effect are too remote and unconnected with each other. Most, if not all, cases of insanity are the result of disease either of the brain or nervous system, and such disease may in many instances be caused by accident; but what phase of insanity the diseased mental condition may assume it is impossible to tell, or to trace to antecedent causes. In this instance, whether the injury received by the fall was the cause of the killing was too conjectural to be submitted to the jury as a direct cause of self-destruction.

The judgment of the Superior Court of Detroit is affirmed.

Campbell, C. J., and Sherwood, J., concurred. Morse, J., did not sit.

SUPREME COURT OF CALIFORNIA.

GULF OF CALIFORNIA NAV. & EXP. CO.)

vs.

STATE INVESTMENT & INS. CO.*

A marine time-policy permitted the vessel to prosecute voyages anywhere upon the navigable waters of the globe, but upon its back was the indorsement. "vessel to be employed in the Gulf of California, and captain is privileged to act as his own pilot without prejudice to this insurance."

Held, That the indorsement did not mean that the vessel was to be restricted to the gulf, but that while employed there or when navigating there, the captain might act as her pilot.

MILTON ANDROS and CHAS. PAGE, *for Appellant.*

WHITTEMORE & McKEE, *for Respondent.*

FOOTE, C.

The plaintiff brought suit against the defendant on an insurance policy which the former had obtained from the latter upon a certain vessel. The cause being tried by a jury, the plaintiff had judgment for the amount of the policy, and from that, and an order denying a new trial, the defendant appeals. According to the terms of the policy as written, without the indorsement hereafter to be noticed, it was a time-policy, which, during its continuance, permitted the vessel insured to prosecute voyages anywhere upon the navigable waters of the globe, except that it was prohibited from using certain enumerated ports. But upon the back of the policy, by agreement of the parties thereto, these words were written, and punctuated as follows: "Vessel to be employed on the Gulf of California and captain is privileged to act as his own pilot without prejudice to this insurance."

* Decision rendered, September 2, 1886.

One allegation of the complaint is "that said vessel, while employed in the Gulf of California, was, on the ninth day of January, 1881, totally lost by the perils of the sea." The defendant meets this statement by the following language in its answer: "This defendant, on its information and belief, denies that said vessel, while employed in the Gulf of California, was, on the ninth day of January, 1881, or at any other time, totally lost by perils of the sea."

Upon the question of the sufficiency of the denial by the defendant of the plaintiff's allegation of "a total loss of the vessel by the perils of the sea," the defendant, in its brief, at page 6, says: "We are prepared to admit that the denial would be insufficient in this case if the action had been on a policy which covered a vessel generally against perils of the sea;" citing *Doll vs. Good*, 38 Cal., 289, 290; 1 Wait, Pr., 422.

The plaintiff contends that its right to recover did not depend upon the fact that the total loss of the vessel took place in the Gulf of California, but by reason of the fact that it had a right to recover, in case of such loss, whether it took place in the Gulf of California, or in any other navigable waters not prohibited to the vessel in the policy; and that the defendant's denial, in the form in which it was stated, admitted a total loss of the vessel by the perils of the sea, which is claimed, and not that it took place in said gulf, was the material issue raised by the pleadings. So that the main question in this case, and that upon which all the others raised by the parties really depend, is, what construction is properly to be placed upon the words of the written indorsement on the policy?

The last words of it are, "without prejudice to this insurance." The natural inquiry is, what privilege or privileges were to be conceded "without prejudice to the insurance," and what else, if anything, did the sentence contain? It was unpunctuated save by a period at the end thereof.

We are of opinion that its meaning was either that, while the vessel was employed in the Gulf of California, her captain might act as her pilot "without prejudice to the insurance," or that permission already granted in the body of the policy, to navigate the Gulf of California, was again given in the written indorsement, and that the captain might, while so navigating the ship, act as her pilot "without prejudice to the insurance." It is much more reasonable to suppose one of these two to be the proper interpretation of the language in question than the one for which the defendant contends, viz., that the vessel was thereby restricted

from all the waters which it was privileged to navigate in the body of the policy, and confined by the indorsement to the Gulf of California, as its navigable waters, where its captain was privileged to act as pilot.

Where so important and material a restriction, opposed, too, to the terms of the original contract, is intended to be made, it would seem that such intention, in order to bind the insured, should be expressed in plain and unambiguous terms. The construction which the defendant asks to have placed upon the words of the indorsement, taking all those words as written and punctuated, seems to us to be strained and unnatural. The circumstances, also, that surround the transaction are, we think, not calculated to induce the belief of the correctness of the defendant's construction of the language of the indorsement.

The plaintiff already had the right, before that indorsement was made, to navigate with its vessel the Gulf of California, but we may well suppose that it desired its captain to act while in those waters, as the ship's pilot, and that it sought the modification of the policy with such end in view. And that must have been the prime object; for it did not need any permission, as we have seen, to run its vessel in said gulf,—that it already possessed; and it should not be presumed, under such state of facts, that this permission was given as asked, but only on condition that the other waters in which the vessel had been originally permitted to voyage should be entirely abandoned, unless such an intention had been most plainly and unmistakably expressed.

Nor can we believe that either of the parties to the modification of the policy at the time it occurred, had such an understanding of its terms as that for which the defendant contends; for, had that been the case, the restrictive words, if any such were intended, would have been made as plain of comprehension as are those granting a privilege; and that they were not so is additional evidence in favor of the plaintiff's contention.

We think, therefore, that, considering the terms of the policy, which is made a part of the complaint, and the averments of that pleading, that the denial of the defendant was an admission of the truth of the material fact that the vessel was totally lost by perils of the sea, against which the defendant had insured her, and that the fact of her being lost or not in the Gulf of California was immaterial.

The defendant also contends that the court should have instructed the jury that plaintiff's verdict should be reduced by the sum of \$610, claiming that this sum of money, which was the proceeds of the sale of the abandoned vessel, was presumed to have been received by the plaintiff, and defendant should have credit therefor. But there was no averment in the answer of any such liability of the plaintiff, or the facts out of which it grew. And the allegation in the complaint of non-payment by the defendant of the plaintiff's demand, was not denied in the answer, nor was any payment to the plaintiff of any sum of money whatever therein averred. Thus no issue upon this point existed, or was made up, upon which evidence could properly have been submitted to the jury, or upon which they should have been instructed by the court. The instruction was therefore properly refused.

The propriety of the refusal by the trial court of the motion for nonsuit, to grant the defendant's instructions, and the granting of those given to the jury, and its order denying the motion for a new trial, all depended upon the questions above discussed. Hence the judgment and order last mentioned should be affirmed.

We concur, Belcher, C. C.; Searls, C.

By THE COURT: For the reasons given in the foregoing opinion the judgment and order are affirmed.

SUPREME COURT OF PENNSYLVANIA.

Error to Common Pleas, Somerset County.

HOWARD INS. CO. OF NEW YORK

vs.

HOCKING.*

A statement furnished in compliance with a condition in a policy of fire insurance requiring the insured to furnish in his proofs of loss the origin of the fire, that the same was not occasioned by his fault or fraud, and that he had done nothing to violate the conditions of the policy or render the same void, is sufficient.

Assumpsit by George H. Hocking against the Howard Insurance Company of New York, upon a policy of fire insurance for \$2,000. The material facts are stated in the opinion.

The policy provided, inter alia, that the assured in case of loss, should furnish a statement of when and how the fire originated. In compliance therewith, plaintiff in his proof of loss, stated as follows : "And the said deponent further declares that the said fire did not originate by any act, design, or procurement on his part, or in consequence of any fraud or evil practice done or suffered by him, and that nothing has been done by or with his consent or privity to violate the conditions of insurance, or render void the policy aforesaid."

Upon the trial before Baer, P. J., defendant requested the court to charge :—

"Second. That by the terms of the policy the assured was required to set forth when and how the fire originated; and, as the

* Decision rendered, March 7, 1887.—From *Atlantic Reporter*.

plaintiff had not complied with that clause, he cannot recover, and the verdict must be for the defendant. Answer. We find, when we look at this proof of loss, that the plaintiff did give a statement of the manner in which this fire originated, and therefore we refuse this point.

"Third. That by the terms of the policy no action can be brought unless the amount of the loss was fixed, either by mutual agreement of the parties or by an appraisal, according to the requirements of the policy; and, as the amount was not fixed in either of these ways before suit was brought, there can be no recovery by the plaintiff, and the verdict must be for the defendant. Answer. This point we refuse because, manifestly, if an insurance company were to be excused from paying on that ground, then all it would have to do to defeat a claimant would be to appoint a man to appraise who would stand out for it and refuse to agree.

"Fourth. That by the terms of the policy the defendant company was not required to pay the loss until sixty days after the loss shall have been ascertained in accordance with the within terms of this policy; and as proofs of loss were not made until the twenty-eighth of March, 1885, and suit brought on the seventeenth of April, A. D. 1885, the right of action had not then accrued to the plaintiff, and the verdict must be for the defendant. Answer. This point we reserve as matter of law, to be determined hereafter, and you have nothing to do with it.

"Fifth. Under the pleadings and evidence in this case, the verdict must be for the defendant. Answer. This we refuse."

Verdict for plaintiff. The court subsequently entered judgment for plaintiff on the verdict and point reserved, whereupon defendant took this writ.

W. H. KOONTZ, for *Plaintiff in Error*, presented same argument as in preceding cases of *German-American Ins. Co. vs. Hocking*, ante, 586, and *Commercial Union Assur. Co. vs. Hocking*, ante, 589.

COFFROTH & RUPPEL, for *Defendant in Error*, also presented same argument as in preceding cases.

CLARK, J.

On the twenty-fourth day of March, 1884, George H. Hocking, the plaintiff below, procured a policy of insurance from the Howard Insurance Company of New York, in the sum of \$2,000, on his two-story, frame, tin-roof building, etc., in Meyersdale, Pennsylvania. The policy was for one year. It provided for \$2,000 concurrent in-

insurance; \$1,000 of that sum being in the German-American Insurance Company of Pennsylvania, and \$1,000 in the Commercial Union Company of London. The three policies mentioned were in full force when the property was burned, on the fourth December, 1884. The loss was total, and notice to that effect was promptly given to the company defendant; but the proofs were not furnished until March 28, 1885.

The plaintiff contended that as there was but a single subject of insurance, which was wholly destroyed, and the company had received immediate notice to that effect, under the rule laid down in *Lycoming Ins. Co. vs. Schollenberger* (44 Pa. St., 263), and other cases, no further proofs were required. In the cases of *German-American Ins. Co. vs. Hocking*, ante, 586, and *Commercial Union Assur. Co. vs. Hocking*, ante, 589, with which this case was argued, we held, however, that owing to certain peculiar provisions of the policy in each of the cases, respectively, the rule of *Lycoming Ins. Co. vs. Schollenberger* was inapplicable, and we are, for the reasons there expressed, well satisfied that it is not applicable in this case.

The first assignment of error is, we think, wholly without merit. The plaintiff, in the proofs, did give a statement in negative form as to the origin of the fire, which we think should be regarded as reasonably satisfactory.

The question raised by the second assignment has been fully considered in the case of *Commercial Union Assur. Co. vs. Hocking*, supra, and it will require no further elaboration here. This assignment is not sustained.

The third assignment, however, has more merit. It is to the refusal of the court to affirm the defendant's fourth point, which point is as follows: "That by the terms of the policy the defendant company was not required to pay the loss until sixty days after the loss shall have been ascertained in accordance with the terms of the policy; and as proofs of loss were not made until March 28, 1885, and the suit was brought on April 17, 1885, the right of action had not then accrued to the plaintiff, and the verdict must be for the defendant." This assignment must be sustained. Our reasons for reversal on this point are fully set forth in *German-American Ins. Co. vs. Hocking*, supra, and *Commercial Union Assur. Co. vs. Hocking*, supra, to which we refer.

The suit was premature, and the judgment is reversed.

SUPREME COURT OF TENNESSEE.

LEWIS ET AL., ASSIGNEES,

vs.

KNOXVILLE FIRE INS. CO.*

Suit was brought by assignees under a general assignment for benefit of creditors after a loss, and the policy was also assigned by an indorsement of insured with consent of agent. The policy was made part of the exhibit.

Held, That where the answer virtually concedes the assignment, though admitting nothing as to its terms, the title of assignee is sufficiently made out.

HENDERSON & JOURNALMAN and H. H. TAYLOR, *for Assignees.*

WEBB & MCCLUNG and WASHBURN & TEMPLETON, *for Ins. Co.*

CALDWELL, J.

The bill alleges that on the third day of December, 1878, the defendant, through its agent, issued a policy of insurance, in the sum of \$800, for the period of one year, to Saul & Co., on their stock of goods at Loudon, Tennessee; that on the twenty-first of the same month the goods were destroyed by fire; that three days after the loss the assured, by general assignment, transferred said policy and other property to complainants for the benefit of creditors; that, in addition to said general assignment, Saul & Co. made an assignment on the back of the policy to complainants, with the knowledge of defendant's agent. The policy is exhibited with the bill, and made a part of it, and the complainants say they will file the general assignment, as an exhibit to the bill, on or before the hearing,

* Decision rendered, October 6, 1886.

or "whenever called for." The prayer is for recovery upon the policy, etc.

The insurance company answers, admitting, in express terms, the issuance of the policy, and the destruction of the goods, or a part of them; and then using this language: "As to the terms of the assignment alleged in the bill to have been made by Saul & Co. this respondent knows nothing, and admits nothing, but presumes the instrument itself will be the best evidence of its contents." After these admissions and statements, the insurance company, in its answer, denies that it owes complainants any amount on account of said policy, and sets up and relies upon the fact that the loss * * * was caused by the willful burning of the property mentioned in the bill by one of the insured, to wit, by one of the assignors of the complainants, to wit, by S. L. Saul, Jr., one of said firm of S. L. Saul & Co., * * * with the evil intent to defraud the respondent. In conclusion, respondent states that it is not sufficiently advised to make answer "concerning contracts of insurance made by the assignors of complainants" with other insurance companies.

The policy sued upon, with the assignment thereof to complainant, indorsed upon its back in due form, and signed by Saul & Co., was made a part of the bill, and is in the record; but the general assignment was not produced, and is not in the record.

The chancellor heard the cause upon pleading and the policy of insurance; and, being of the opinion that complainants had failed to show title to the policy, he dismissed the bill. Thereupon complainants brought the cause to this court by writ of error. The honorable commission of referees heard the cause, and recommended an affirmance of the decree, upon the ground that complainants failed to establish their title to the policy. Complainants except to the report, and insist that their title to the policy is sufficiently made out.

We think the decree and the report both erroneous. The bill distinctly alleges the transfer of the policy to complainants by general assignment, and also by indorsement on the back of the policy itself; and the policy is filed with the bill, as a part of it. The answer does not deny or admit the assignment in express words, but it does in its tenor concede the assignment. It says that respondent "knows nothing, admits nothing, * * * as to the terms of the assignment, but presume the instrument itself will be the best evidence of its contents;" thus recognizing the existence of the assignment itself, but admitting nothing as to its terms, which are not known to re-

spondent. This is not all. In two distinct paragraphs, occurring subsequently in the answer, the respondent refers to Saul & Co., the assured, as the "assignors" of complainants; not as the alleged assignors, or the supposed assignors, but as in fact the assignors of the policy to the complainants. Then the least that can be said of the answer on this point is that it impliedly admits the assignment, and concedes complainants to be the owners of the policy. After this implied admission, and this concession, the rights of complainants to recover upon the policy is denied on the ground that the policy was avoided by the fraud of one of the assured in burning the goods himself. The bill seeks a reference to ascertain the value of the goods destroyed, and the proportional part of the loss to be borne by the policy sued upon, there being concurrent policies in other companies upon the same goods.

The report of the honorable commission of referees will be set aside, the decree of the chancellor reversed, and the cause remanded for an account, and further proceedings. Respondents will pay the costs of this court.

SUPREME COURT OF IOWA.

Appeal from District Court, Fremont County.

ATKINSON

vs.

HAWKEYE INS. CO.*

The application provided that no liability should attach until it had been approved at the home office. The applicant paid the agent the premium, taking in return a receipt stating that it was subject to the approval of the company, and that in case the company declined to issue a policy it should be returned. The premium and application were forwarded to the company by mail, but were never received, no policy was issued, and no premium was returned, and no one connected with the company except the agent knew that the application had been made until the property was destroyed, nearly five months later.

Held, That the company was not liable.

W. H. WILSON and W. P. FERGUSON, *for Appellant*.

DRAPER & THORMELL, *for Appellee*.

ROTHBROCK, J.

The facts essential to a proper determination of the case are as follows: One Baylor was a soliciting agent of the defendant at Tabor, in this State. The plaintiff made a written application to him for insurance upon his dwelling-house by the defendant company. This application was made upon one of the printed forms in use by the company. This printed blank form was as follows :—

Application is made by ———, of ———, county ———, State of Iowa, for insurance against loss or damage by fire ———, to the Hawkeye Insurance Company, in the sum of ——— dollars, for the term of ——— years from the

* Decision rendered, March 12, 1887.

— day of —, 188—, by a policy with the usual conditions of the company, on the property hereinafter mentioned, viz.: [Here follows a description of the property on which insurance is sought]. The applicant agrees that each of the foregoing answers, statements, and valuations are true, and a warranty on his part, and that the accepting of this risk, and the issuing of a policy of insurance thereon by the company, is to be based solely upon this application; * * * that no liability of the company shall attach until this application has been actually approved by the home office.

Upon making the application the plaintiff paid to Baylor the sum of \$10.80 premium and policy-fee, and Baylor delivered to the plaintiff a receipt in these words:—

Received of J. H. Atkinson an application for insurance, by the Hawkeye Insurance Co. of Des Moines, Iowa, on property to the amount of \$500, for the term of five years from date, with \$10.80, and an obligation for —, due and payable on the — day of —, 188—, premium and policy-fee, subject to the approval of the company. In case the company shall decline to issue a policy on said application, then the obligation and premium received shall be returned to him by mail or otherwise.

Dated August 30, 1882.

D. R. BAYLOR, Soliciting Agent.

Baylor, being a soliciting agent only, immediately upon the receipt by him of the application and premium, deposited them in the post-office, properly directed to the home office at Des Moines. They were never received by the defendant, nor any of its officers. The application and receipt were made and the premium paid upon the thirtieth day of August, 1882. The dwelling-house of plaintiff was destroyed by fire on the eighth day of January, 1885. No officer nor agent of the defendant, except Baylor, had any knowledge that an application for insurance had been made by plaintiff until after the building was destroyed. There are other facts in the case which, in the view we take of the rights of the parties, are not necessary to be stated.

Counsel for plaintiff contend that, although Baylor was unauthorized to execute contracts of insurance, yet that the transaction became a contract as soon as the company could have an opportunity to accept the risk, and failed to do so, or return the premium. If the defendant had received the application and premium, and retained the same, and remained silent, it may be that it should be held to have approved the application. But this question is not in the case. The company had no knowledge that any application had been made and premium paid, and no contract can therefore be implied from any neglect to issue the policy founded upon the knowledge of the defendant that such an application had been

made. The case is very much like *Walker vs. Farmers' Ins. Co.* (51 Iowa, 679, 2 N. W. Rep., 583), where it was held that the giving of an application for insurance to an agent of the company authorized to receive applications only, and the execution of a premium-note, do not constitute a contract for insurance. In that case the agent of the defendant neglected to forward the application and premium-note, and the company had no knowledge of their existence until after the property was destroyed by fire. In this case the agent was not negligent. We think the case is controlled by that above cited, which was followed and approved in *Armstrong vs. State Ins. Co.*, 61 Iowa, 212, 16 N. W. Rep., 94. Affirmed.

SUPREME COURT OF IOWA.

WELSH

vs.

DES MOINES INS. CO.*)

The mere written certificate of a veterinary surgeon that the animal insured had been struck and killed by lightning, is not sufficient compliance with the Iowa statute prescribing what proofs of loss shall be necessary to sustain an action on a policy.

COLE, McVEY & CLARK, *for Appellant.*

S. R. DYER, *for Appellee.*

ROTHBOCK, J.

1. The property insured consisted of a barn, wagons, work-horses, and cattle. The plaintiff claimed that a valuable cow included in the insured property was struck with lightning and killed; and it was averred in the petition that the plaintiff fulfilled all of the conditions of said insurance on her part, and, before the commencement of the action, "gave to the defendant due notice and proof of said cow being struck by lightning, and loss aforesaid, and duly demanded payment of the sum of three hundred dollars." The defendant, by its answer, denied that the cow in question died or was struck by lightning, and averred that, if the same be dead, the cause of her death was disease; and it is especially alleged in the answer that plaintiff did not at any time give to the defendant any notice nor proof of the alleged loss under said policy. The policy required that, in case of loss or damage, the assured should notify the secretary of the company within thirty days from the time

* Decision rendered, March 12, 1887.

the loss occurred, and the assured was also required to make proper proofs of loss.

To sustain the allegation that these requirements of the policy had been complied with, the plaintiff introduced in evidence a letter of which the following is a copy:—

BOONE, IOWA, JULY 16, 1885.

Theo. F. Gatchell, Des Moines, Iowa: The cow mentioned in policy No. 22,198, Mrs. H. F. Welsh, as appears from the inclosed statement, was struck by lightning on the morning of thirteenth inst., from the effects of which she died on the fifteenth inst. Please send some one to adjust the loss at once.

W. W. NIXON, Agent.

Inclosed in the above letter there was a statement of which the following is a copy:—

Boone, Boone Co., State of Iowa: I, the undersigned veterinary surgeon, do hereby certify that I was called to see Thilda Williams, a full-blooded Jersey cow, owned by George H. Welsh, on the thirteenth of July, 1885, and found upon examination of said animal that, in my opinion, she had the night previous been struck by lightning, which caused the hindmost parts, together with the bowels, to become paralyzed, which caused death on the fifteenth day of July, 1885.

C. EASTWOOD, Vt.

We, the undersigned, having examined the animal, find from external marks that the above statement is correct.

ALFR. L. TORNBLOM.

E. A. WARREN.

The defendant objected to these instruments on the ground that they did not show notice and proof of loss. The objection was overruled. Whatever may be said of the notice of loss as evidence, it is very plain that the instrument signed by Eastwood was in no just sense proof of loss. The policy did not require any specific mode of proof of loss. Section 3, c. 211, Laws 1880 (Miller's Code, 299), prescribes what proof of loss shall be necessary to maintain an action upon a policy of insurance. It must be by "affidavit, stating the facts as to how the loss occurred, so far as they are within his (the assured's) knowledge, and the extent of the loss. * * *" The object of this statute was to simplify the proofs of loss necessary to be made, and to prevent insurance companies from availing themselves of technical defenses founded upon unreasonable requirements in making proofs of loss. In the case at bar what is claimed to be proof of loss is not an affidavit. It is a mere certificate of a veterinary surgeon that a cow was struck by lightning, and killed. It does not give the extent of the loss, nor name the plaintiff herein as the owner of the cow, but fixes the

ownership in another. We think that, under the issue made in the pleadings, this evidence should not have been admitted.

¶2. It is claimed that the so-called "proof of loss," in connection with certain parol evidence in the case, shows that the defendant made no objection to the form of the proof of loss, or, in other words, that the defendant waived proper proofs of loss. The defendant objected to said parol evidence, and the objection was overruled. In our opinion, this evidence should have been excluded, because it did not correspond with the averments of the petition. There was no allegation therein that proper proofs of loss were waived: *Lumbert vs. Palmer*, 29 Iowa, 104; *Woolsey vs. Williams*, 34 Iowa, 413; *Edgerly vs. Farmers' Ins. Co.*, 43 Iowa, 587; *Zinck vs. Phoenix Ins. Co.*, 60 Iowa, 266. Reversed.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF MISSOURI, E. D.

CONNECTICUT MUT. LIFE INS. CO. }

vs. }

FISHER AND ANOTHER.*

The insured assigned a policy on his life to a creditor not merely as security, but absolutely in full payment of the debt. The assignee again assigned it to a savings institution as security for a debt. H. subsequently purchased the debt and succeeded to all the rights of the institution. In a contest between the original assignee and H. on the grounds that the latter had no interest in the the insured and therefore no right to the proceeds;

Held, That H. was entitled to the funds.

In Equity.

DYER, LEE & ELLIS, for the Insurance Company.

BROADHEAD & HAUESSLER, for Holthaus.

FRANK K. RYAN, for Fisher.

Oral opinion by THAYER J.

The claimants of the fund which has been paid into court in this case are respectively assignees of the policy of life insurance out of which the fund arises. Henry J. Stroh, on whose life the risk was taken, assigned the policy to defendant Fisher in payment and discharge of a debt, and not merely as security therefor. Fisher, as appears from his answer, made an out-and-out purchase of the policy, and became the absolute owner of the same. He then assigned it to the United States Savings Institution as security for a debt

* Decision rendered, May 7, 1887.

which he owed that bank. Subsequently, by a purchase of the debt, Holthaus succeeded to all the rights of the bank under the policy. Fisher now contends that, as neither the bank nor Holthaus were creditors of Stroh, they had no insurable interest in the assured life, and consequently that Holthaus is not entitled to the fund. If the point is well made as against defendant Holthaus, it would seem to be equally tenable as against the claim of Fisher. Fisher avers that he purchased the policy. By taking an assignment of the policy in discharge of his debt, and not merely by way of security, he extinguished the relation of debtor and creditor as between himself and Stroh, and, as it would seem, had no further insurable interest in the life of the latter. As the death of the assured would expedite the payment of the policy, it would rather appear that such an event would be to the advantage of the assignee of the policy, and thus lay the assignment or purchase open to the objection that it was against public policy. In point of fact, the transaction whereby each claimant acquired the policy was not intended as a mere speculation or wager. Fisher undoubtedly took the policy to secure as much as he could of a bad debt, and the United States Savings Institution, now represented by Holthaus, evidently loaned money to Fisher in good faith, and in the ordinary course of business, taking the policy as collateral.

The defense of want of insurable interest, in my judgment, might have been invoked by the insured with as much reason against one claimant as against the other, as neither claimant appears to have had any interest in prolonging the assured life after the respective assignments were made. The insurer, however, has waived the defense of want of insurable interest, by paying the fund into court, and confessing its absolute liability on the policy either to Fisher or to Holthaus. As between the two claimants, I consider that Holthaus has the superior right, inasmuch as he holds the policy under and by virtue of a transfer of the same by Fisher, whereby the latter pledged the proceeds thereof when the policy became payable to secure his own debt. I have not overlooked the case of *Warnock vs. Davis* (104 U. S., 775), wherein the Supreme Court of the United States have held that the assignee of a policy must have some interest in the life of the assured to entitle him, under an assignment of a policy, to hold and retain the proceeds thereof. This case, however, under the facts as above stated, does not seem to call for an application of that doctrine. The controversy here is between two successive assignees of a policy, and not between an assignee of a

policy and the personal representative of the assured. For the purposes of this decision, it is conceded by the pleadings that one or the other of the assignees of the policy is entitled to the fund; and in that view of the matter, and for the reason above indicated, I am of the opinion that Holthaus has the superior right.

A decree will be entered disposing of the fund in the manner above indicated.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF MISSOURI.

VETTE

vs.

CLINTON FIRE INS. CO.*

The loss occurred on February 23d; proofs were furnished March 12th, and suit was begun September 14th, following. The policy was payable sixty days after notice and proofs received in accordance with its terms. It provided that no suit should be sustainable until an award had been obtained nor unless commenced within six months after the loss had occurred.

Held, That the limitation did not begin to run until the time when the right of action accrued by virtue of the other provisions, and the suit was not barred.

MUENCH & CLINE, *for Plaintiff*.

GIVEN CAMPBELL, *for Defendant*.

Oral opinion by THAYER, J.

In this case the action is upon a policy of fire insurance, and the question to be decided arises upon a demurrer to the petition. The loss occurred on the twenty-third of February, 1886. Proofs of loss were furnished on the twelfth of March, 1886, and this suit was brought on the fourteenth of September, 1886. By the terms of the policy the loss is made payable "sixty days after due notice and proofs of the same shall have been made by the assured, and received at the company's office, in accordance with the terms and provisions of the policy." The policy contained a further provision: "That no suit or action against the company for recovery of any claim, by virtue of this policy, shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim; nor unless such suit or action shall have been commenced within six months after the loss shall have occurred."

* Decision rendered, April 30, 1887.

If the provision last read is construed literally, and without reference to any other provisions of the policy, it would follow that this action was barred on the twenty-third of August, 1886; but, if it is construed in connection with other provisions, a different result may be attained. The clause in question is a special statute of limitations, created by contract between the parties, and it has been held that such stipulations are valid: *Riddlesbarger vs. Hartford Ins. Co.*, 7 Wall., 389.

But when does the period of limitation begin to run, in view of other stipulations in the policy? It would seem reasonable to so construe the stipulation as to give the assured the full term of six months in which to sue, after a right to sue has accrued, and this, I think, was the intent of the parties to the contract. The loss is not payable until sixty days after proofs are furnished, and by a further provision the assured is deprived of his right to sue until an award has been made fixing the amount of the claim. In the mean time, according to defendant's theory, the limitation prescribed by the policy is running against the demand, and barring plaintiff of his remedy, although the time has not arrived when it is possible for him to maintain an action. Ordinarily, a statute of limitations does not begin to run until a right of action has accrued,—that is to say, until the plaintiff has full liberty to sue, if he is so inclined; and I see no good reason for construing the special statute of limitations imported into this contract in such way as to make it operative during a period when, by virtue of other stipulations of the contract, the right of action is suspended. There is another consideration which supports the view above expressed. The stipulation in question limiting the right of action to six months after the loss occurs, is a provision inserted for the special benefit of the insurer. If, then, by comparing the stipulation with other provisions of the policy, a doubt arises as to the time when the limitation begins to run, that construction ought to be given (if it be a reasonable construction) which is most favorable to the assured, against whom it was intended to operate. The view which the court has taken seems to be in harmony with the views expressed by other courts on the same question, *vide Steen vs. Niagara Fire Ins. Co.*, 89 N. Y., 315; *Mayor, etc. vs. Hamilton Ins. Co.*, 39 N. Y., 45; *Chandler vs. St. Paul Ins. Co.*, 21 Minn., 85; *Spare vs. Home Mut. Ins. Co.*, 17 Fed. Rep., 568; and *May, Ins.*, § 479.

The demurrer is overruled, and the defendant held to answer.

SUPREME COURT OF MINNESOTA.

Appeal from an order of the District Court, Douglas County.

WILSON

vs.

MINNESOTA FARMERS' MUT. FIRE INS. ASS'N.*

An assignment of error that the court erred in denying a motion for a new trial is too general to be available.

If, when an application for insurance is made in which the premises are represented as free from incumbrance, the insurer knew of an incumbrance upon the property, he will be deemed to have waived, as respects such incumbrance, a condition of the policy that misrepresentation in that respect should avoid the contract.

Knowledge of the fact received by an agent at a time when he is not acting as such, if actually had in mind by the agent when he subsequently acts for his principal, will, as respects that transaction, be imputed to the principal.

The court having submitted an issue of the fact to the jury upon evidence assumed to have been directed to that fact, and no exception having been taken, nor any suggestion made that the subject referred to in the evidence was not shown to be indetical with the subject in issue, it is too late upon appeal to assign that as error on the part of the court.

NELSON REYNOLDS and TREAT, BURCKHART & REYNOLDS, *for Appellant*,
Minnesota Farmers' Mut. Fire Ins. Ass'n.

CLAPP, WOODARD & COWIE, *for Respondent*, Wilson.

DICKINSON, J.

The appellant's first assignment of error is that the court erred in denying defendant's motion for a new trial. This is too general, and is of no avail. It is no assignment of error, within the meaning of the rule which contemplates a specification of the errors by reason of which the appellant asks a reversal of the order or judgment appealed from.

* Decision rendered, November, 23, 1886.

The second assignment of error cannot be sustained. Under the amendment made to the reply during the trial, it was competent for plaintiff to show that the agent of the defendant knew, at the time the application was made, that the property was incumbered. The defendant, if chargeable with knowledge of the fact, would be deemed to have waived the conditions of the policy making a misstatement as to such fact to avoid the insurance: *Shafer vs. Phoenix Ins. Co.*, 53 Wis., 361; s. c., 10 N. W. Rep., 381; 1 Wood, *Fire Ins.* § 90. If the agent, although not acting as such when the information was communicated to him, retained a recollection of the fact, and had it in mind when effecting this insurance, such knowledge would affect the principal: *Lebanon Savings Bank vs. Hollenbeck*, 29 Minn., 322; s. c. 13 N. W. Rep., 145; *Wade, Notice*, § 687, and cases cited. The evidence that a few days before the insurance the assured informed the agent who afterwards effected the insurance of the existing incumbrance was therefore admissible, even though that alone were deemed insufficient to charge the defendant with notice.

When the exception referred to in the third assignment of error was taken the court qualified the instruction excepted to, and to the instruction as thus qualified no exception was taken.

It was admitted by the pleadings that when the insurance was effected there was a mortgage upon the property for \$800 and interest, given to the Dundee Mortgage Trust Investment Company. The only evidence of notice to the agent of an existing incumbrance referred to a mortgage of \$850 in favor of MacMaster, in Fergus Falls. It was not shown that these different designations referred to and were the same mortgage. The fourth assignment of error rests upon the fact that no such identity was shown. The point is, in substance, that the court erred in submitting to the jury the question as to whether the defendant had notice of the Dundee mortgage. As to this it is enough to say that the court submitted the case to the jury as though the mortgage designated in the pleadings, and that to which the evidence related, were the same. No suggestion was then made that such was not the fact, no exception was taken to the instruction in this respect, and it is now too late to assign this as error on the part of the court.

The assignment of errors contains no other specifications than those to which we have referred, and the order refusing a new trial is affirmed.

SUPREME COURT OF IOWA.

AMERICAN INS. CO. }

vs. }

GARRETT.*

A premium-note payable in four annual installments was given for the insurance. After the first installment became due the insured mailed the policy to the company and requested a cancellation.

Held, in an action on the note that the insured was liable for the installment due at the time of the rescission

CHAS. E. RANSIER, E. M. THOMPSON, and GEO. W. WILSON, *for Appellant*.

L. F. SPRINGER and J. H. WILLIAMSON, *for Appellee*.

ROTHROCK, J.

The note in suit is in these words :—

\$50.

For value received in policy No. 176,619, dated the twenty-ninth day of June, 1874, issued by the American Insurance Company of Chicago, Illinois, I promise to pay the said company twelve dollars and fifty cents on the first day of June, 1875, and twelve dollars and fifty cents on the first day of June, 1876, and twelve dollars and fifty cents on the first day of June, 1877, and twelve dollars and fifty cents on the first day of June, 1878, without interest.

R. P. GARRETT.

The amount in controversy being less than \$100, the appeal comes to us upon the following certificate of the trial judge :—

“The amount in controversy in this cause, as shown by the pleading, does not exceed one hundred dollars. The cause involves the determination of a question of law upon which it is desirable to

* Decision rendered, March 15, 1887.

have the opinion of the supreme court, as follows: First. Is it a complete defense to an action on an installment promissory note due in four equal annual installments, given for the premium on an insurance policy, the execution of which note is admitted by the answer, to show that the assured, more than a year after said note was given, mailed the policy to the insurance company plaintiff, and in the letter accompanying said policy requested cancellation thereof, the assured neither paying, nor offering to pay, any part of the premium-note,—there being at that time one installment of the note past due and unpaid, and three installments not mature, there having been two notes given for the premium on said policy, the first of which was paid when it became due, upon notice from the company, and no notice of non-acceptance and of cancellation of policy, as requested by defendant, was ever received by the defendant, and no notice to pay the further installments due on said note as they became due, no notice having afterwards been received by the defendant to pay said note, and there being no evidence of the condition of the policy of insurance? Second. Under the facts being shown on the trial in the foregoing question, was it error in the court to overrule plaintiff's motion to direct a verdict for plaintiff? Third. Under the facts being shown on the trial as stated in the first question was it error on the part of the court, on its own motion, to direct a verdict for the defendant? This certificate is made by the court at the time of overruling plaintiff's motion for a new trial, and at the time judgment is rendered in said action against the plaintiff, on this October 16, 1885.

“W. H. Urr, Circuit Judge.”

It will be observed that the note in suit names the consideration thereof to be the policy of insurance. It was a contract of insurance, and the defendant claims that he rescinded the contract by returning the policy to the plaintiff. But the certificate shows that this rescission was not made until after the first installment of the notes became due. The defendant was surely liable to pay all dues up to the time that he chose to rescind the contract. In order to absolve himself from further liability to the plaintiff, he should have paid the installment then due. We think that, under the facts, the jury should not have been directed to return a verdict for the defendant. Reversed.

SUPREME COURT OF IOWA.

Appeal from Circuit Court, Jasper County.

MITCHELL

vs.

 GRAND LODGE IOWA KNIGHTS
 OF HONOR AND OTHERS.*

The charter of a benevolent society stated the object "to provide benevolent and charity by establishing a widows and orphans' fund * * from which a sum * * shall be paid to his family or as he may direct.

Held, That the member had absolute power to designate the beneficiary, who need not be a member of his own family.

STAHL BROS. & GILMAN, *for Appellant*.

WINSLOW & VARNUM, *for Appellee*.

SEEVERS, J.

The articles of incorporation and constitution of the grand and subordinate lodges are made a part of the petition, and it is conceded that the benefit fund, to recover which is the object of this action, must be paid to the person entitled thereto, as provided therein. A certificate of membership was issued to the deceased, and, when issued, it was therein stated that Margaret F. Mitchell was the beneficiary, and entitled to receive such portion of the benefit fund as was due, by virtue of the membership of said Charles F. Mitchell. Said Margaret, however, was not his wife, heir, or member of his family; and the sole question to be determined is whether she or the plaintiff is entitled to the fund.

The articles of incorporation provide "that the object of this corporation shall be to unite all acceptable men, of every profession,

* Decision rendered, December 15, 1886.

* * * to provide benevolence and charity, by establishing a widows and orphans' fund, from which, on satisfactory evidence of the death of a member of the corporation, * * * a sum not exceeding two thousand dollars shall be paid to his family, or as he may direct. * * *

It is further provided in the constitution of subordinate lodges that every applicant for membership "must be a male person, * * * competent to earn a livelihood for himself and family."

It is contended by counsel for the appellant that the avowed object of the corporation is to provide a widows and orphans' fund for the family of deceased members, and that the widow and children of the deceased member are named as a class to whom the fund is due and must be paid. That it is the primary object of the corporation to provide such a fund for the benefit of widows and children of deceased members must, we think, be conceded, but it is just as clearly provided that the fund shall be paid to such beneficiary as the member may direct. If it had been intended that such direction must be confined to a member of the family of the member, we think it would have so been said in express terms. As the absolute power is given the member to designate who the beneficiary shall be, and as this has been done, we are unable to see how such direction can be disregarded, and the fund paid to some one else. We understand this to be the uniform holding of the courts that have been called upon to determine a similar question, under articles of corporation indential, in substance at least, with the controlling provisions of the articles of corporation which must govern in this case: *Gentry vs. Supreme Lodge Knights of Honor*, 23 Fed. Rep., 718; *Highland vs. Highland*, 109 Ill., 366; *Supreme Lodge Knights of Honor vs. Martin*, 12 Ins. Law J., 628; *Knights of Honor vs. Nairn*, 26 N. W. Rep., 826; *Stephenson vs. Stephenson*, 64 Iowa, 538; s. c., 21 N. W. Rep., 19.

Counsel for the appellant have cited a number of adjudged cases, but in none of them was there a provision in the articles of incorporation or rules of the order like that in question, and they have only a remote, if any, application to the case in hand.

The judgment of the district court is affirmed.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF MISSOURI.

KEARY AND OTHERS

vs.

MUTUAL RESERVE FUND LIFE ASS'N.*

Where a policy of insurance provides for the payment of different sums to different parties, it is improper for the beneficiaries to join in one action to recover the several sums due.

Where, however, all the beneficiaries have joined, and a demurrer to the petition has been sustained, it may be ordered that each plaintiff file his separate petition upon his cause of action, and that the defendants be ruled to answer without further service of process.

W. B. THOMPSON and M. McKEAG, *for Plaintiffs.*

W. C. & JAMES C. JONES, *for Defendant.*

BREWER, J.

This suit is on an insurance policy for \$10,000. The policy provides for the payment of \$2,000 to one party, \$1,000 to another, and so on. All the different parties in interest, beneficiaries in the policy, have joined in one action, and the demurrer is on the ground of improper joinder of causes of action. The petition states the condition under which the policy matured. It states the promise on the part of the insurance company in one instrument to pay different sums of money to different parties. Of course, there may be a unity of interest in the subject-matter of the action, but there is no unity of interest in the relief desired. If, for instance, one of these beneficiaries is paid, the others have no interest in and are not prejudiced by that payment; and he has no interest in the money which is due the

* Decision rendered, March 24, 1887.—From *Federal Reporter*.

other beneficiaries. Each one has a separate interest in the money which by the terms of the policy is payable to him or to her. I think, therefore, under the practice which obtains and the rule laid down under the State code, the demurrer will have to be sustained. But all the parties plaintiff are in court. The defendant is in court. All the causes of action are stated, and I think it is within the power of the court, and the order will so be made, after sustaining the demurrer, that each plaintiff may file his or her petition upon his or her cause of action, and without other process the defendant will be ruled to answer within thirty days each petition.

I may add that in this matter, although my Brother Thayer sat with me on the bench, he took no part in the decision, it being disposed of by myself alone.

SUPREME JUDICIAL COURT OF MAINE.

SWEAT
vs.
PISCATAQUIS MUT. INS. CO.*

The materiality of a misrepresentation of title in an application for insurance is a question of fact for the jury.

CROSBY & CROSBY, *for Plaintiff.*

HENRY HUDSON and C. A. EVERETT, *for Defendant.*

WALTON, J.

Whether an erroneous description or misrepresentation of title in an application for insurance is or is not material is a question of fact for the jury, and not a question of law for the court. In this case the plaintiff in her application for insurance stated that the property was unincumbered, when in fact there was a mortgage upon it. The presiding judge instructed the jury that this misrepresentation was not material. This was error. The materiality of the misrepresentation should have been submitted to the jury : Rev. St., c. 49, § 20; Bellatty vs. Insurance Co., 61 Me., 414.

Exceptions sustained. New trial granted.

Peters, C. J., Danforth, Emery, Foster, and Haskell, JJ., concurred.

* Decision rendered, February 12, 1887.

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REPORT OF DECISIONS.

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF INDIANA.

HOLLAND, GUARDIAN,)
 us.)
TAYLOR AND OTHERS.*)

The certificate of a benevolent society was payable to the executors for the benefit of a daughter of the insured. The by-laws provided that benefits were to be payable to dependent beneficiaries, and that upon surrender of the certificate a new one might be issued payable to such dependent beneficiaries as the insured might direct.

Held, That the beneficiary could only be changed by a surrender of the certificate.

Where the insured by will directed his executors to pay his debts from the benefit in a certain case; to invest the proceeds for the benefit of his daughter, and in case of her death to divide them among certain parties.

* Decision rendered, May 24, 1887.

Held, That the insured could not dispose of the proceeds by will, the executors could only collect the money and pay it over to the guardian of the daughter.

BYFIELD & HOWLAND, *for Appellant*.

VINSON CARTER, *for Appellees*.

ZOLLARS, C. J.

On the twenty-fifth day of August, 1884, the Royal Arcanum, whose principal office and supreme council are in Boston, issued to Charles D. Taylor, of Indianapolis, a certificate in these words :—

ROYAL ARCANUM BENEFIT CERTIFICATE.

This certificate is issued to Charles D. Taylor, a member of Hoosier Council No. 394, Royal Arcanum, located at Indianapolis, Ind., upon evidence received from said council that he is a contributor to the widows and orphans' benefit fund of this order, and upon condition that the statements made by him in his application for membership in said council, and the statements certified by him to the medical examiner, both of which are filed in the supreme secretary's office, be made a part of the contract; and upon condition that the said member complies in the future with the laws, rules, and regulations now governing said council and fund, or that may hereafter be enacted by the supreme council to govern said council and fund. The conditions being complied with, the supreme council of the Royal Arcanum hereby promises and binds itself to pay out of its widows and orphans' benefit fund, to Samuel Taylor and Martin V. McGilliard (executors), for the benefit of Anna Laura Taylor (daughter), a sum not exceeding three thousand dollars, in accordance with and under the provisions of the laws governing the said fund, upon satisfactory evidence of the death of said member, and upon the surrender of this certificate; provided, that the said member is in good standing in this order at the time of his death, and, provided, also, that this certificate shall not have been surrendered by said member, and another certificate issued at his request, in accordance with the laws of this order. In witness whereof the supreme council of the Royal Arcanum has hereunto affixed its seal, and counsel this certificate to be signed by its supreme regent, and attested and recorded by its supreme secretary at Boston, Massachusetts, this twenty-fifth day of August, 1884.

JOHN HASKILL BUTLER, Supreme Regent.

Attest : W. O. ROBSON, Supreme Secretary.

On the back of the certificate is this form :

FORM OF CHANGE OF BENEFICIARY.

Council No. —, R. A. To —, supreme secretary S. C. R. A.: I hereby surrender and return to the supreme council of the Royal Arcanum the written benefit certificate No. —, and direct that a new one be issued to me, payable to —,

[Seal of sub-council.]

Member's signature, —.

Attest : —, Secretary.

The Royal Arcanum is governed by a constitution and by-laws, section 2 and 3 of the by-laws being as follows :—

Sec. 2. Each member shall enter upon his application the name or names of the members of his family, or those dependent upon him, to whom he desires the benefits paid, subject to such future disposal of the benefit among his dependents as the member may thereafter direct, and the same shall be entered on the benefit certificate according to said directions, etc.

Sec. 3. A member may at any time, when in good standing, surrender his benefit certificate, and a new certificate shall thereafter be issued, payable to such beneficiary or beneficiaries dependent upon him as such member may direct, upon the payment of a certificate fee of fifty cents.

On the twenty-second day of August, 1884, the day on which, as alleged in appellees' answer, Taylor applied for the above certificate, he made his will. In that will he recited as a fact, that he had in his possession a policy of life insurance for \$3,000, issued to him by the Royal Arcanum, and payable to Samuel Taylor and Martin V. McGilliard, his executors, for the benefit of his daughter, Anna Laura Taylor. In another item of the will the testator directed that in the event of his personal property being insufficient to pay his debts, the first interest or earnings of the life insurance fund should be applied to that object, the principal to remain intact. In another item he directed that after his death, the insurance fund should be collected by his "said administrators," and safely invested in real-estate loans, and that the interest derived therefrom should be first used in the payment of his debts, and the remainder in the education of his daughter, Anna Laura, according to the best judgment of his "administrators;" that in the event of his daughter being left motherless, the fund should be used for her benefit, in accordance with the judgment of his "administrators;" and that, when she should arrive at the age of twenty-one years, the fund, with accumulated interest, should be paid to her. By another item of the will and codicil thereafter made, the testator directed that, in the event of the death of his daughter before arriving at the age of twenty-one years, the insurance fund should be given, and divided by his administrators, a certain portion to his wife, another portion to his father, another portion to a person neither related to nor dependent upon him, and still another portion to the American Baptist Home Mission Society. In another item appellees, Samuel Taylor and Martin V. McGilliard, were designated as the executors of the will.

The assured and testator, Charles D. Taylor, died in February, 1885. Subsequently appellees were appointed and duly qualified as executors of the will, and collected the insurance fund from the Royal Arcanum. Subsequent to the death of the testator, also, ap-

pellant was appointed guardian of the person and estate of the daughter, Anna Laura. In May, 1885, he filed his petition in the Marion circuit court, asking therein for an order upon the executors to pay over to him, as such guardian, the fund so collected by them from the Royal Arcanum. That petition, and the answer thereto by the executors state the facts substantially as above recited. The court overruled a demurrer to the answer, and held that the executors were entitled to the fund, to be disposed of as the will directs. The question for decision is, shall the benefit-fund remain in the hands of the executors, to be managed, disposed of, and distributed as the will directs, or ought it to be turned over to the guardian as the absolute property of the daughter, Anna Laura Taylor? Upon a fair construction of the certificate, the by-laws of the order are a part of the contract. Therefore, by accepting the certificate, the member Taylor obligated himself to comply with the by-laws, and agreed that payment should be made to the executors for the benefit of his daughter, unless the certificate should be surrendered by him, and another issued at his request, in accordance with the laws of the order. He, and all concerned, would have been bound by the by-laws, even though there had not been such a reference to them in the certificate.

Benevolent associations, such as the Royal Arcanum appears to be, are in the nature of mutual insurance companies. Persons who become members of such associations, and accept certificates, are bound to take notice of the by-laws. They enter into and become a part of the contract the same as if they were written out in the certificate : *Bauer vs. Sampson Lodge Knights of Pythias*, 102 Ind., 262. Whatever rights beneficiaries have in life policies, they have by virtue of the contract between the insurance company and the assured. In the case of an ordinary insurance policy, the rights of the beneficiaries in the policy, and to the amount to be paid upon the death of the assured, is a vested right, vesting upon the taking effect of the policy. That right cannot be defeated by the separate or the combined acts of the assured and insurance company, without the consent of the beneficiary: *Harley vs. Heist*, 86 Ind., 197, and authorities there cited; *Damron vs. Penn Mut. Life Ins. Co.*, 99 Ind., 478, and cases there cited. As in other cases, so here, whatever right or power Taylor, the assured, had to and over the certificate, was by virtue of the terms of the certificate, and the by-laws of the order, which, together, constituted the contract between him and the order; and whatever rights the beneficiary, Anna Laura,

had, or now has, to the fund to be and in this case paid upon the death of the assured, her father, she had and has by virtue of the same contract. It should be observed that the Royal Arcanum is not a domestic corporation, and hence not affected by section 3,858 of our statute (Rev. St., 1881) : Presbyterian Mut. Assur. Fund vs. Allen, 106 Ind., 593.

If, then, the Royal Arcanum were to be treated as an ordinary life insurance company, and the certificate as an ordinary life policy, it would be clear that Taylor, the assured, had no authority, by will or otherwise, to change the beneficiary, nor in any way affect her rights without her consent. For many, and indeed for most, purposes, mutual benefit associations are insurance companies, and the certificates issued by them are policies of life insurance, governed by the rules of law applicable to such policies. There are, however, some essential differences usually existing between the contracts evidenced by such certificates and the ordinary contract of life insurance : Presbyterian Mut. Assur. Fund vs. Allen, *supra*; Elkhart Mut. Aid Benev. & Relief Ass'n vs. Houghton, 103 Ind., 286; Bauer vs. Samson Lodge Knights of Pythias, *supra*.

The most usual difference is the power on the part of the assured in mutual benefit associations to change the beneficiary. But, as in either case the rights of the beneficiary are dependent upon and fixed by the contract between the assured and the company or association, there seems to be no reason why the assured should have any greater power to change the beneficiary in one case than in the other, except as that power may be inherent in the nature of the association, or is reserved to him by the constitution or by the laws of the association, or by the term of the certificate. In the case before us the right and power of the assured, Taylor, to change the beneficiary, was reserved to him by the by-laws of the order, and recognized in the certificate. Because of that reservation the beneficiary, Anna Laura, did not have a right in and to the certificate, and the amount to be paid upon the death of the assured vested in such a sense that it could not be defeated. But it would be saying too much to say that she had no rights. She was the beneficiary named in the certificate. The executors, so far as shown by the terms of the certificate, had no rights at all, either in or to the amount to be paid by the association. So far as shown by that certificate, they were mere trustees to collect the amount for the use and benefit of the real beneficiary, Anna Laura. So long as the contract remained as executed, she had the right of a beneficiary,

subject to be defeated by a change of the beneficiary by the assured. So long as the certificate remained as executed, the assured had reserved to himself the power to change the beneficiary, and that was the extent of his right in or power over the certificate, or the amount agreed to be paid at his death. He had no interest in or to either the certificate or the amount agreed to be paid that would have gone at his death to his personal representatives. By virtue of the by laws and the certificate which, as we have seen, constituted the contract between him and the Royal Arcanum, he had power to change the beneficiary. That same contract fixed the mode and manner in which that change might be made. And we think that, taking the by-laws and certificate together, the mode and manner of changing the beneficiary was fixed as definitely, and was as binding upon the assured, as was the right to make such change binding upon the association and the beneficiary. In other words, under the contract, the assured had a right to change the beneficiary, provided he made the change in the manner provided in the contract. The agreement was that he might change the beneficiary by surrendering the certificate, and taking another payable to such beneficiary "dependent upon him," as he might direct. In that contract Anna Laura, the beneficiary, had such an interest as that she had and has the right to insist that, in order to cut her out, the change of beneficiary should be made in the manner provided in the contract. The contract clearly contemplated that the change should be made and perfected by the assured during his lifetime.

It was not contemplated that he might make such a change by will, of which neither the association nor the beneficiary named in the certificate would have notice before his death, and which would not take effect until after his death.

In many of the cases reported in the books, it appears that such associations had provided in their by-laws and certificates that changes of beneficiaries might be made by the will of the assured. In the absence of such provisions, the decided weight of authority is that such changes cannot be made by will, and that to be effectual and binding upon the beneficiary named in the certificate, they must be made in the mode and manner provided in the by-laws and certificate. In other words, they must be made in the manner and mode provided in the contract. From the by-laws and certificate before us, it is clearly apparent, also, that the undertaking on the part of the association was not to pay a sum of money for the benefit of the estate of the assured, but for the benefit of members of

his family, and those dependent upon him. Under the second by-law set out above, the member was required to enter upon his application the name or names of the members of his family, or those dependent upon him, to whom he desired his benefits paid, subject to such future disposal of the benefits among his dependents as he might thereafter direct. By the third by-law, the association agreed that, upon a surrender of the certificate by the member, it would issue another to him payable to such beneficiary or beneficiaries dependent upon him as he might direct. Thus, under the by-laws, the assured might substitute a new beneficiary, provided such beneficiary was a member of his family, or dependent upon him, and provided the change of beneficiary was made in the manner prescribed in the by-laws. Taylor, the assured, did not make a change of beneficiary in the manner prescribed in the by-laws, nor did he name as new beneficiaries members of his family only, or those dependent upon him. He disregarded the provisions of the by-laws prescribing the manner of changing, and prescribing what class of persons might be named as beneficiaries, and attempted to make a change by his will. It is true that he did not attempt to deprive the daughter of all rights as beneficiary, but, treating the certificate as though it belonged absolutely to him, undertook to dispose of the amount to be paid at his death by directing how it should be managed by the executors of his will, and directing that they should use the income from it as assets of his estate for the payment of his debts. And finally, without changing the beneficiary in the manner prescribed in the by-laws, he undertook to deal with the certificate, and the amount to be paid upon it at his death, as though the daughter had no rights to either, except as might be bestowed by his will, and as though they both belonged to him to be disposed of by will as his property. And, thus treating them, he undertook to dispose of the fund by giving it to others, neither members of his family nor dependent upon him, provided the daughter did not attain the age of twenty-one years. Without further elaboration upon this branch of the case, our conclusion is that Anna Laura, having been named in the certificate as the beneficiary, and there having been no change of beneficiary in the manner prescribed in the by-laws of the association, she became the absolute owner of the insurance fund upon the death of her father, unaffected by the will. As fully sustaining our conclusion we cite the following cases : *Masonic Mut. Ben. Soc. vs. Burkhardt*, 10 N. E. Rep., 79; *Supreme Lodge Knights of Pythias of the World vs. Schmidt*, 98 Ind., 374;

Stephenson vs. Stephenson, 64 Iowa, 534; Hellenberg vs. District No. 1 of Independent Order of B'nai B'rith, 94 N. Y., 580; Vollmans' Appeal (Lang's Estate), 92 Pa. St., 50; Eastman vs. Provident Mut. Relief Ass'n (N. H.), 20 Cent. Law J., 266; Coleman vs. Supreme Lodge Knights of Honor, 18 Mo. App., 189, 14 Ins. Law J., 635; Daniels vs. Pratt, 10 N. E. Rep., 166; Supreme Lodge Knights of Honor vs. Nairn (Mich.), 22 Cent. Law J., 274; Gould vs. Emerson, 99 Mass., 154; Kentucky Masonic Mut. Life Ins. Co. vs. Miller, 13 Bush, 489; Hogle vs. Guardian Life Ins. Co., 1 Bigelow Ins. Cas., 597; Worley vs. Northwestern Masonic Aid Ass'n, 10 Fed. Rep., 227, 11 Ins. Law J., 141, 3 McCrary, 53; McClure vs. Johnson, 56 Iowa, 620; Maryland Mut. Ben. Soc. vs. Clendine, 44 Md., 429.

Appellees' counsel cite and rely upon the case of Splawn vs. Chew, 60 Tex., 532. That case is not in harmony with what we hold here as to the want of power by the assured to change the beneficiary by a will; nor is it in harmony with the cases above cited. It was held in that case that the by-law providing a mode for changing the beneficiary was directory only; that it was for the benefit of the association alone, and might be waived by it; that, the association not objecting, the assured might change the beneficiaries by a will; and that the beneficiaries named in the certificate could not, after the death of the assured, be heard to say that there had been no change of beneficiaries in the manner provided in the by-laws. As we have already said, in effect, in the case before us, our judgment is that the mode and manner of changing the beneficiary was as obligatory upon the contracting parties, and all concerned, as was the reservation of the power to the assured to make such change. The beneficiary, Anna Laura, did not have an indefeasible right in the contract evidenced by the certificate, nor in the amount to be paid upon it upon the death of the assured; but she had an interest in them subject to be defeated by the change of beneficiary in the mode and manner provided by the by-laws, which were a part of the contract: *Supreme Lodge Knights of Pythias vs. Schmidt*, *supra*. Taylor, the assured, neither changed, nor attempted to change, the beneficiary in the mode and manner provided in the by-laws. He could not accomplish that end, nor affect the ultimate rights of the beneficiary by a will. Upon his death, therefore, Anna Laura became entitled to the amount to be paid upon the certificate as her absolute property. Appellees, executors, having collected from the Royal Arcanum, hold the amount so collected in trust for her, but they have no right to control, manage

and dispose of the fund as directed by the will, because as to that fund the will is of no effect. The fund belonging absolutely to her, her guardian is entitled to it, to control and manage it as the court may direct until she shall have arrived at the years of majority. The court below, therefore, erred in overruling the demurrer to appellees' answer.

In answer to counsel, it is sufficient to say that the fact that Taylor made his will upon the same day that he requested the certificate to be so made, as that the amount should be paid to his executors for the benefit of his daughter, can make no difference. The will constituted no part of the contract between him and the Royal Arcanum. That order agreed in the certificate to pay the amount to "Samuel Taylor and Martin V. McGilliard (executors), for the benefit of Anna Laura Taylor (daughter)," but it in no way consented that the beneficiary should be changed, nor that the fund should in any way be turned away from her, by the will of the assured. Indeed, there is nothing to show that the agents and officers of the order had knowledge that anything of the sort had been attempted by the assured.

The judgment is reversed, at the cost of appellees, and the cause remanded, with instructions to the court below to sustain appellants' demurrer to the answer, and to proceed in accordance with this opinion.

COURT OF APPEALS OF MARYLAND.

Appeal from the Superior Court of Baltimore City.

FIRE INSURANCE ASSOCIATION OF ENGLAND

vs.

MERCHANTS AND MINERS' TRANSPORTA-
TION CO.*

The policy insured the M. Transportation Co. for account of whom it may concern, on merchandise its own or in its charge or custody as carriers, and for the amount of earned freight and charges if any; loss payable to the treasurer for account of whom it may concern. Property was burned while stored in charge of the company, the owners of which held floating policies covering it while in transport. Under the bill of lading the company was exempt from liability for loss by fire.

Held, That the company as bailee, though without pecuniary interest, might insure for the owners, and where such appears to be the motive, the insurance will inure to the benefit of the owners.

Held, That where such insurance contemplates contribution from other insurers, a court will construe the contracts of such other insurers, though not parties to the action, to determine the contributive liability of the policy in dispute.

THOS. M. LANAHAN, JOHN H. THOMAS, and FRANK GOSNELL, *for Appellant*.

W. PINCKNEY WHYTE and JOS. H. WHYTE, *for Appellee*.

MILLER, J.

This appeal is from a judgment for \$4,777.49, recovered by the appellee against the appellant, in an action on an insurance policy issued by the latter to the former on the 1st of November, 1883. The case was tried before the court without a jury, and two excep-

* Decision rendered, January 4, 1887.

tions were taken, one to the admissibility of evidence, and the other to rulings upon propositions of law. Of the two main questions which the exceptions present for review, one goes to the right of recovery to any extent, and the other raises the question of contribution under the seventh condition of the policy.

The written part of the policy is that the Fire Association, "in consideration of \$30 to them paid by the insured hereinafter named, the receipt whereof is hereby acknowledged, do insure the Merchants and Miners' Transportation Company, for account of whom it may concern, against loss or damage by fire to the amount of \$5,000, on merchandise, being chiefly cotton in bales, its own, or in its charge or custody as carriers, and for the amount of earned freight and charges, if any, thereon, stored in the frame, metal-roof freight-shed of the Norfolk and Western Railroad Company, situated nearest the water-front of its wharf and dock at the lower end of Main Street, in Norfolk, Virginia, and marked No. 1 on diagram; loss, if any, payable to Geo. J. Appold, treasurer Merchants and Miners' Transportation Company. Issued to the Merchants and Miners' Transportation Company for account of whom it may concern. Other insurance permitted." By the printed terms immediately following the insurer agrees to make good "to the said assured, their successors, executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum or sums insured as above specified, nor the interest of the assured in the property, except as herein provided, as shall happen by fire to the property so specified, from the 31st day of October, 1883, to the 31st day of December, 1883; the amount of loss or damage to be estimated according to the actual cash value of the property, and to be paid sixty days after due notice and proofs of the same shall have been made by the assured and received at the office of the company in Philadelphia."

It is not necessary to state at present any of the other provisions or conditions of this instrument.

The circumstances which led to this insurance are substantially as follows: The Merchants and Miners' Transportation Company is a common carrier by water, and in October and November, 1883, was engaged in transporting cotton from Norfolk to ports in the New England States. The firm of Juneau & Company had purchased cotton for certain New England cotton-mills at Atlanta and other points in the cotton-growing States, and as consignor was forwarding the same to the mills via Norfolk. This cotton ar-

rived by rail at Norfolk in large quantities during the latter part of October and the first of November, and the transportation company had difficulty in procuring steamers or vessels to carry it on to its destination, and it was stored in one of the freight-sheds of the railway company at its wharf to await transportation. In this state of things the transportation company took out this policy, together with twenty-two others of like character, but of different amounts, in twenty-two other fire insurance companies. The aggregate of insurance thus effected was \$50,750, and the premiums paid therefor amounted to \$299.75. After these policies had been issued, and while the cotton remained thus stored, the carrier company, by its agent, executed a receipt for the same on the sixth of November, so that it then came within the terms of the policy as being in the "care or custody" of the assured "as carriers." On the fourteenth of November a fire occurred in this freight-shed, by which one thousand and ten bales of this cotton were destroyed or injured. How the fire originated is not explained except in the preliminary proof of loss by Mr. Appold, the president of the assured, who states he believes it was from a spark emitted by a tug or steamer in the adjacent river, and, in the absence of other proof on the subject, we must assume it was from this or some unknown cause. The value of the cotton thus burned, exclusive of salvage, was between \$47,000 and \$48,000. No part of it was owned by the carriers, and the cotton-mills, who were the owners and consignees thereof, held open or floating policies in other companies under which they insured their cotton while in transit from the place of purchase to the mills. These have been termed in argument marine policies, and we shall refer to them again. It turned out at the trial that where these carriers received the cotton, they received it under the terms of a bill of lading by which they were exempt from loss by "fire from any cause on land or water," and, consequently they were not liable over to the owners for this loss. They was no "earned freight;" and, before this suit was brought, they had been paid by the insurers all that they had demanded in the shape of charges and expenses. The suit, therefore, must be prosecuted, if at all, solely for the benefit of the owners, and whatever is recovered must go them.

First. Upon these facts the question arises, can the suit be maintained? In our opinion it can, and we shall state briefly the ground of that opinion. It has been decided by this court, and upon abundant authority, that a person having goods in his possession as

consignee, or on commission, may insure them in his own name, and for their full value, and in the event of loss, recover the full amount of the insurance, and after satisfying his own claim hold the balance as trustee for the owner : *Hough, Clendenning & Co. vs. People's Fire Ins. Co.*, 36 Md., 432. The law as thus stated is, of course, based upon the assumption that the assured had an insurable interest in the property at the time of the insurance, and we are inclined to the opinion that this transportation company had such interest, at least in respect to "charges" and freight expected to be earned, notwithstanding it had no pecuniary interest in or ownership of the cotton itself and was not liable over for its loss by fire. But however that may be, the law goes further, and it is now well settled that where a person has the custody, care, or possession of property for another and bears the relation to it of consignee, carrier, factor, warehouseman, or bailee, he may, though he has no pecuniary interest therein and is not responsible for its safe-keeping, insure it in his own name for the benefit of the owners, and the insurance will inure to their benefit upon a subsequent adoption of the insurance, even after the happening of a loss under the policy: 1 *Wood Fire Ins.* (2d ed.), §§ 293, 294, and this must be so, otherwise policies "for account of whom it may concern," which are frequently taken out by and in the name of a party in possession, without any previous authority from the owner, could never have been upheld. But such policies are daily issued, and though more frequently used in marine insurance, are sometimes found in other policies, and it has become elementary law in regard to them, that extrinsic evidence may be adduced to show who was in fact the party concerned, and any one having title to the property at the time of loss may be adopted, and avail himself of the advantages prescribed in the contract if it be shown that his interest was within the contemplation of the party procuring the insurance. The fact that the interest of the owners was contemplated by the insurer in this case, seems apparent from the contract itself when read, as it must be, in the light of the surrounding circumstances already stated. That this carrier company should have effected insurance against fire "for account of whom it may concern," and to an amount exceeding \$50,000 on this cotton, when they did not own a bale of it and were not responsible for its loss by fire, without intending to protect thereby the interest of the owners, is almost incredible. The inference that they did so intend is strong, if not irresistible. But at all events the proof is quite sufficient to warrant a jury in finding such intent. Nor is there any

doubt but that these owners had an insurable interest when the loss occurred, for they were the absolute owners of the cotton then as well as when the insurance was effected. Have they then adopted this policy? As was said by the supreme court in a case where a similar policy was under consideration: "The adoption of the policy need not be in any particular form; anything which clearly evinces such purpose is sufficient." *Hooper vs. Robinson*, 98 U. S., 537. Adoption is a question of fact, and all we need say on this point is that we think there is enough in this record to have authorized a court to submit that question to the finding of a jury.

But counsel for the appellant contended that by the terms of this policy the obligation of the insurer to make good the loss insured against is expressly limited to the interest of the assured. The argument in support of this position is ingenious and is founded upon what counsel insists is the true grammatical construction of that part of the printed portion of the policy above quoted. According to this construction they contend that the terms, "except as herein provided," refer to the "loss or damage," in the previous part of the sentence, and that their office is simply to exclude therefrom such loss as by subsequent conditions the insurer was exempted from paying, and that they in no wise modify the preceding terms which limit the amount to be paid to a sum "not exceeding the interest of the insured in the property." But this reading would, as it seems to us, be in conflict with the intention of the parties as expressed in the written part of the instrument; and we have already said that this part, read in connection with the surrounding circumstances, manifests an intention to insure more than the mere interest of the insured carrier. There is ample authority as well as good sense for the position that where the written and printed portions of a policy conflict, effect must be given to the former, because being incorporated into the contract at the time it was made, it is presumed that it expresses the actual agreement of the parties and that they intended thereby to override that portion of the contract expressed in type which is inconsistent therewith: 1 *Wood Ins.* (2d ed.), § 58. But it is not necessary in this case to go to the extent of adopting the law as thus stated, for we think the terms "except as herein provided," in the connection in which they stand, are quite susceptible of being read as referring to the written as well as to the subsequent printed portions, and as modifying the immediately preceding terms limiting the extent of liability. So read, they remove all conflict, and effectuate the intention of the parties as ex-

pressed in the written part; and this construction would seem to be sanctioned by the rule laid down of old by Lord Hale that, "Judges ought to be curious and subtle to invent reasons and means to make acts effectual according to the just intent of the parties; they will not, therefore, cavil about the propriety of words when the intent of the parties appears, but will rather apply the words to fulfill the intent than destroy the intent by reason of the insufficiency of the words." *Crossing vs. Scudmore*, 2 Lev., 9. Courts are no more inclined now, than they were in the days of Lord Hale, to draw fine distinctions, or be nice about the grammatical construction of sentences, whether in insurance contracts or others, in order to sustain a defense in which there is no merit.

We regard this policy as an insurance upon specific goods stored in a specified place, under which the interest of the owner, if properly asserted, can be protected.

If, therefore, a jury, or a court acting as a jury, should find in their favor the facts which we have said must, under the proof in this record, be left to such finding, the action can be maintained; and from this it follows that the court below was right in rejecting the defendant's first and seventh propositions or prayers. We are also further of opinion that under the circumstances disclosed in the record, the plaintiff was in no default in furnishing the preliminary proofs of loss, and that there was evidence in the case which afforded sufficient means of determining the amount, if any, the plaintiff was entitled to recover. There was consequently no error in the rejection of the defendant's second and tenth prayers.

Second. The second main question is that of contribution under the seventh condition of the policy, and the defense founded thereon is clearly meritorious. This seventh condition is the latent modification that has fallen under our notice, of what has been termed the "American clause," and so much of it as need be stated is as follows: "In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon; and it is hereby declared and agreed that in case of the assured holding any other policy in this or any other company on the property insured subject to the conditions of average this policy shall be subject to average in like manner. Any floating policy attaching in whole or in part to the property covered by this policy shall, as between the assured and

this company, be considered as contributing insurance for the full amount of such policy, and liable as such to pay pro rata any loss, total or partial, on the property hereby insured."

The latter paragraph seems to have been framed to meet precisely such a case as the present. As we read it the stipulation is plain that any floating policy attaching to the property, whether effected by the assured or the owner, or any other party interested, shall, as between the insured and insurer under this policy, be brought under the rule of contribution. In this case the owners had such floating policies which purported to cover this cotton, and whether they attached to it depends, so far as the parties in this suit are concerned, upon the construction they are to receive by this court on this appeal. We do not agree in opinion with the learned judge of the superior court that it was not proper for him to determine the construction of these policies, because the companies who issued them are not parties to this suit. They are documents produced in evidence in this case, and the rights of the parties to this suit are to be determined by the construction placed upon them in the first instance by the trial court, and finally on appeal by this court, no matter how they may be construed by other courts, or in other suits between other parties. It is our duty, therefore, to consider these policies and ascertain their meaning and construction, and in doing this we have encountered very little difficulty.

They are thirteen in number and were issued by four different companies. There are some features common to all of them, and it be said generally that they all insure cotton against loss by fire from any place of purchase in any Southern State, by any route to the mills of the owners in the New England States. They also contain stipulations accepting a risk of fire on shore for a certain number of days before shipment. As illustrating this we take the policy of the Phoenix Insurance Company, insuring the Whittenton Manufacturing Company of Taunton, Mass., where the provision is "also to cover the risk of fire on shore for ten days prior to shipment." A literal reading of this stipulation would make it not only ineffectual but nonsensical, for cotton destroyed by fire cannot afterward be shipped. The evident meaning of it, however, is that if the cotton is burned while on shore and awaiting shipment, and the loss occurs within ten days after the insurance upon it is effected, then the policy covers the loss; but if the fire occurs after the lapse of such ten days, then the risk does not attach. In this particular case the insurance was from Norfolk to Taunton, and the cotton had

been for some time stored in the freight-shed awaiting shipment. The insurance upon it was effected on the seventh of November, and the fire occurred on the fourteenth of the same month, less than ten days thereafter, and it seems to us too plain for argument that the loss is covered by this policy. No difficulty whatever is presented by any of the other policies, unless it be the one by which the Delaware Mutual Safety Insurance Company insured the Massachusetts Cotton Mills, and in which is found the provision "to attach as soon as water." But this, we think, by a fair construction of the policy, refers to the immediately preceding provision which makes the policy cover coal from Southern coal-ports and places to Boston or Salem, and not to the provision which expressly insures cotton purchased or to be purchased and shipped from any ports and places in the United States, except Boston, "by any route to the mills at 'Lowell.'" Such being our construction of these policies, we entertain no doubt but that they are contributing insurances within the meaning of the seventh condition of the policy in suit. In our opinion, therefore, there was error in granting the plaintiff's eighth prayer which denies the defendant's right to such contribution, as well as in rejecting the defendant's fourth prayer, in which it asserts that right. Being of opinion that this is a case in which there must be such contribution, provided the plaintiff shall eventually succeed in maintaining the action and in recovering, we approve the rejection of the defendant's eighth prayer, which throws the whole loss upon the marine policies.

We are also further of opinion that the court below committed an error in admitting in evidence the contract referred to in the first exception. It is an agreement executed after this suit was brought, and to which the defendant is not a party. It seems to us to be clearly *res inter alios* and inadmissible.

Judgment reversed and new trial awarded.

SUPREME COURT OF OHIO.

Mandamus.

THE STATE, *EX REL.* NEW ENGLAND MUTUAL
LIFE INS. CO.,

vs.

H. J. REINMUND, *SUPL. OF INSURANCE.*

THE STATE, *EX REL.* JOHN HANCOCK MUTUAL
LIFE INS. CO.,

vs.

SAME.

THE STATE, *EX REL.* BERKSHIRE LIFE INS. CO.,

vs.

SAME.*

1. Section 2,745 of the Revised Statutes, which provides that every agency of an insurance company organized out of this State shall return to the auditor of the county where such agency is located, in the month of May annually, the amount of gross receipts of such agency, which shall be entered upon the tax-list and be subject to the same rate of taxation as other personal property, prescribes the rate of taxation upon every foreign insurance company doing business in this State. Section 282 of the Revised Statutes which provides that when, by the laws of any other State, any taxes are imposed on insurance companies of this State doing business in such State, the same obligations shall be imposed upon all insurance companies of such other State doing business in this State, is operative only when it is shown that the law of the State where such company is organized, taxes Ohio companies doing business there at a rate higher than foreign companies are taxed by the mode provided by section 2,745. And in such case the superintendent of insurance is authorized to assess and collect from such foreign company, in addition to such tax on the gross re-

ceipts, such sum as will be sufficient to make the total equal to the amount that would be realized were the rule of taxation of the State under whose laws the foreign company is organized, applied to such company's business transacted in this State, but no more.

2. Where a foreign insurance company has furnished to the superintendent of insurance a certificate of the valuation of its policies in force on the 31st day of December preceding, upon the lives of citizens of this State, made by the proper State officer of the State under whose law such company is organized, and such valuation is according to the standard provided in section 279 of the Revised Statutes, such superintendent is not authorized to require compensation for valuation of such policies, notwithstanding such company has paid a like charge in former years, and has furnished to such superintendent, at his request, the data from which such valuation was made.

EVERETT, DILLENBAUGH & WEED, and BURKE, INGERSOLL & SAUNDERS,
for Relators.

HARMON, COLSTON, GOLDSMITH & HOADLY, for Defendant.

The New England Mutual Life Insurance Company, the John Hancock Mutual Life Insurance Company and the Berkshire Life Insurance Company are insurance companies created under the laws of Massachusetts. As the material facts in the three cases are the same, the disposition of one will dispose of the others.

The relator first named, claimed that it has complied with the laws of this State requiring its agents in the several counties to return to the auditor in the month of May annually, the amount of gross receipts of the agency for taxation as other personal property is taxed; that it has paid in the several counties the amount so assessed in so far as the several treasurers would receive the same, and is ready and willing to pay the balance so soon as such treasurer will accept it; that it has tendered to the defendant an additional sum sufficient to make the amount thus paid and to be paid equal to the amount that would be due if the rule of taxation provided by the laws of Massachusetts were applied to the relator's business in Ohio, and that in all respects it has complied with the laws of the State, and is entitled to be permitted to do business in Ohio during the present year. The defendant demands a larger sum, and threatens if the amount so claimed is not paid in full, to deprive the relator of its right to carry on its business of life insurance in this State. This proceeding is brought to compel the defendant to accept the amount tendered as payment in full of all rightful demand.

The defendant insists that because of certain retaliatory laws of the State of Massachusetts, he is entitled to collect of relator, in addition to the amount paid and to be paid as taxes, an amount

equal to the one-fourth of one per cent upon the net valuation of all policies in force December 31, 1886, on lives of citizens of Ohio, and a further charge of one cent on the \$1,000 as compensation for valuation of the policies of the relator.

SPEAR, J.

The two items of charge may be considered separately. In order to determine the first we are called upon to construe the statutes of Ohio upon the subject, and to ascertain, as a practical matter, what, by the laws of Massachusetts as now enforced, is required of life insurance companies incorporated under the laws of Ohio doing business in that State. If, as matter of fact, companies organized in Ohio doing business in Massachusetts are required to pay excise tax at a rate greater than Massachusetts companies doing business in this State are required by our tax-laws to pay, then the exaction is proper and may be enforced; otherwise not.

Section 2,745 of the Revised Statutes provides that "every agency of an insurance company incorporated by the authority of any other State or government, shall return to the auditor of the county in which the office or agency of such company may be kept, in the month of May, annually, the amount of the gross receipts of such agency, which shall be entered upon the tax-list of the proper county, and subject to the same rate of taxation for all purposes that other personal property is subject to at the place where located."

Section 282, Revised Statutes, has this provision: * * * *
"When, by the laws of any other State or nation, any taxes, fines, penalties, license-fees, deposits of money, or of securities, or other obligations or prohibitions, are imposed on insurance companies of this State, doing business in such State or nation, or upon their agents therein, so long as such laws continue in force, the same obligations or prohibitions of whatever kind, shall be imposed upon all insurance companies of such other State or nation doing business within this State, and upon their agents here."

A construction was given to the foregoing sections of the statute by this court in the decision of the case of the State, ex rel. the Fire Association of Philadelphia, vs. the present defendant, rendered in June of last year. In that case the defendant had charged against the relator, as additional to the tax required by section 2,745, 3 per cent on gross receipts, because of a law of the State of Pennsylvania which imposes an annual tax of 3 per cent upon gross receipts of foreign insurance companies doing business in that State, thus seek-

ing to collect of that company a tax of about 5½ per cent while in Pennsylvania an Ohio company would only be taxed at the rate of 3 per cent. The relator had tendered an amount sufficient to make the whole tax equal to 8 per cent on the gross receipts, and asked a writ of mandamus to compel the defendants to accept that sum in full. A peremptory writ was awarded. The case was not reported, but the court must necessarily have determined that the two sections were not cumulative, but that section 282 was enacted for the purpose of equalizing burdens, and that that section could have application only where, by the laws of another State, the tax imposed upon Ohio companies was greater than that imposed in this State under section 2,745, and then only to the extent of such excess. In other words, our law is protective in its character, its purpose being to protect Ohio insurance companies from impositions which might be put upon them by other States, and not retaliatory in the sense of first imposing upon foreign companies such taxes as are imposed upon other foreign corporations under like circumstances, and then in addition, a sum equal to what other States may impose upon our companies doing business there. And the superintendent of insurance performs his whole duty in the matter when he requires companies organized out of this State to pay, in addition to the amount paid as taxes in the several counties, a sum sufficient to make the total equal to the amount that would be realized were the rule of taxation of the State under whose laws the foreign company is organized applied to such company's business transacted in this State. This view is in consonance with a recognized policy of this State of long standing, which is to invite, rather than repel, the investment and use here of foreign capital. In this spirit, the obvious intent of the State is to encourage the location here of agencies of companies organized in other States, having large experience as insurers and possessed of abundant capital in order to afford to our people the manifold benefits of the security given by their contracts, and any unnecessary discrimination against those companies would be inconsistent with this enlightened policy, and would tend to injuriously affect our people. The language employed in the sections quoted fails to show any purpose on the part of the legislature to depart from this well-settled policy.

The law of Massachusetts relied upon to justify the amount charged by the defendant against the relator, is embraced in the following sections: "Sec. 25. Every corporation and association engaged within the commonwealth, by its officers, or by agents, as

defined by chapter one hundred and nineteen, in the business of life insurance, whether incorporated by this commonwealth, or otherwise, shall annually pay an excise tax of an amount to be determined by assessment of the same at the rate of one-quarter of one per cent per annum upon a valuation equal to the aggregate net value of all policies in force on the 31st day of December, then next preceding, issued or assumed by such corporation or association and held by residents of the commonwealth." "Sec. 31. Every life insurance company, corporation, association, or partnership incorporated or associated by authority of any other State of the United States, by the laws of which State a tax is imposed upon the premium-receipts of life insurance companies chartered by this commonwealth and doing business in such State, or upon their agents, shall annually, so long as such laws continue in force, pay a tax or excise upon all premiums charged or received upon contracts made in this commonwealth, at a rate equal to the highest rate imposed during the year upon life insurance companies chartered by this commonwealth, or upon their agents doing business in such other State.

Section 25 has received construction by the Supreme Judicial Court of Massachusetts. A law similar in all respects to this section except as to the per cent imposed, was held in *Connecticut Ins. Co. vs. Commonwealth* (133 Mass., 161) to be a tax not upon property but upon the franchise, the right to do business, being as to foreign corporations, thus permitted to exercise the franchise by cernity, a condition which the State see fit to prescribe attached to the privilege granted. A like construction was given by this court in *Telegraph Co. vs. Mayer* (28 Ohio St., 522) to a law similar to section 2,745 above quoted imposing a tax upon gross receipts of foreign express and telegraph companies. So that, the object and nature of section 25 of the Massachusetts law, and of section 2,745 of our law is the same. Each imposes a tax upon the privilege of doing business; each aims to raise revenue, and each is to be enforced according to its terms, irrespective of the law of any other State upon the subject. Section 31 has received practical construction by the tax commissioner of Massachusetts. No case is cited showing that it has received judicial construction; nor is it necessary to a determination of the present case that construction be given to it by us. It is, however, apparent that the two sections, taken together, relate to the same subject-matter, to wit: the imposing of burdens upon foreign life insurance companies as a condition to their doing business in that State. As above stated, this court has held that a tax

on gross receipts is a charge for the privilege of doing business; section 31 imposes a tax on gross receipts; hence, it as well as section 25, imposes a tax on the privilege of doing business. So far the two are alike. But it is not (as in 25) absolute in its requirements; it is contingent upon the prior imposition by another State of burdens by way of taxation upon gross receipts of Massachusetts companies, and the existence of the continuous right of such imposition, and the declared purpose is that foreign companies shall pay excise tax upon premiums received in Massachusetts at a rate equal to the highest rate imposed by such other States upon Massachusetts companies. This purpose would apparently be accomplished by adding to the sum realized by the mode prescribed by section 25 such tax on gross receipts as would make the whole sum exacted equal to the highest rate imposed by such other State upon Massachusetts companies, and would not seem to require that the tax on gross receipts should necessarily be added to the rate imposed by the other State to the amount realized by the assessment of one-quarter of one per cent in net values. In the absence of authoritative construction by the courts of Massachusetts, it is reasonable to treat the two sections as in *pari materia*, section 25 as fixing the absolute rate of taxation; section 31 as a proviso authorizing the imposition of additional excise tax, to the end that the entire tax shall equal the highest rate imposed upon life companies chartered by that commonwealth doing business in other States. And we may assume that, were a case made, the courts of Massachusetts would give a construction to section 31 similar in spirit to that given by this court to section 282 of our statutes.

But, as before suggested, the question is, what is actually imposed by way of tax upon Ohio companies doing business in Massachusetts? Perhaps this question is fully answered by the statement that in fact there is no Ohio life insurance company doing business in Massachusetts. But we may go farther and inquire what practice prevails there as to insurance companies of other States. This question is one of fact. Before the defendant can justify an exaction of the character here being considered he must make it appear that, as matter of fact, the authorities of Massachusetts require of foreign companies, a greater tax than our authorities impose upon foreign companies. This he has neither shown nor attempted. On the contrary, it is shown by testimony that the practice in Massachusetts upon the subject is in strict accord with that of this State as enforced by this court in *The State, ex rel. Fire Association of Philadel-*

phia, vs. Reinmund. Supt., before referred to. That is, if the tax of the other State does not exceed one-quarter of one per cent upon the net value of policies in force on the 31st day of December preceding, then that would be all that the tax commissioner (answering to our superintendent of insurance) would assess or collect, while if the tax in the other State on Massachusetts companies, assessed upon gross receipts, is in excess of one-quarter of one per cent on net value of policies, such excess only is exacted in addition to the one-quarter of one per cent. So that, an Ohio company doing business in Massachusetts would be required to pay no more than is by our section 2,745 required of Massachusetts companies doing business here, unless it were shown that one-quarter of one per cent upon the net value of policies in force in that State, was a sum greater than the percentage of the gross receipts, in which case there would be added the excess only.

Applying the Massachusetts rule here, if the rate of percentage on net value of policies as provided by section 25 is in excess of the sum that would be produced by the percentage assessed in Ohio on gross receipts, then the Massachusetts company is subject to further assessment to the extent of such excess; but if the amount realized by percentage on net value of policies of the company December 31st, preceding, is not larger than would be realized by our assessment on gross receipts, then no farther exaction can be required. To illustrate. The gross receipts of the relator in Ohio for the year 1886, was \$24,720.00. The annual taxes on this sum, imposed by section 2,745, amounts to \$621.80. The net value of policies outstanding on the 31st of December, 1886, held by citizens of Ohio, amounted to \$349,815.75; one-quarter of one per cent on this is \$874.54, being in excess of the tax above given, \$252.74. Upon payment of this last-mentioned sum the relator will have fully satisfied the claim of the defendant under the sections of the law under consideration. We hold that so long as the present mode of assessment prevails in Massachusetts, this State has no ground for retaliation, and that, except to the extent above stated, there is no authority for the charge of one-quarter of one per cent on the net value of policies.

The other item in dispute is a charge of one cent on the \$1,000, insured by the relator on lives, compensation for valuation of policies. Section 279, Revised Statutes, provides that "when the laws of any other State of the United States authorize a valuation of life insurance policies by some designated State officer, according to the standard herein provided, or according to the standard which makes

the value of the policy not less than the standard herein provided, or according to any other standard which makes the value of the policy not less than that of the standard herein provided, the valuation made according to the said standard, by such officer, of the policies and other obligations of any life insurance company not organized under the laws of this State, and certified by said officer, may be received as true and correct, and no further valuation of the same shall be required of such company by the superintendent of insurance." Section 282, Revised Statutes, provides that "there shall be paid, also, by every life insurance company doing business in this State, annually, by way of compensation for the valuation of its policies, in case no certified valuation of the same has been furnished to the superintendent of insurance, as provided in section two hundred and seventy-nine of this chapter, one cent on every thousand dollars insured by it on lives."

The relator furnished to the defendant proper certificate of the certified valuation of its policies, made by the commissioner of insurance of Massachusetts, the proper State officer. The valuation was according to the standard provided in our statute. We find no authority in law for this exaction; nor does the fact that the relator in former years paid a like charge, or that, at the request of defendant, the company's agent furnished the data upon which the defendant's valuation was based, estop the relator from disputing the charge.

Peremptory writ awarded.

COURT OF APPEALS OF MARYLAND.

ORIENT MUTUAL INS. CO. }

vs. }

ANDREWS.*

A marine policy provided that the insured should furnish verified proofs stating among others the nature and extent of his loss, and further provided how it should be estimated, and that the loss should be payable sixty days after furnishing such proofs.

Held, That though the company might contest the propriety of the demand made or its liability at all, the measure of damages was sufficiently supplied by the contract to enable the plaintiff to swear to his claim upon filing a declaration, and to give him a right under the laws of Maryland to a judgment by default.

JOHN STEWART and DAVID STEWART, *for Appellant*.

C. R. GOODWIN and RICHARD S. CULBRETH, *for Appellees*.

IRVING, J.

The question presented by this appeal is whether a judgment by default, rendered in favor of the appellee, and which was extended for amount ascertained, and final judgment entered, ought to have been stricken out on the application of the appellants in the court below. The court refused to strike out. It is contended by the appellants that the cause of action of the appellees did not give them a right to the judgment by default, under the act of 1864, chapter 6, regulating practice in certain cases in Baltimore City, for the want of a sworn plea, filed to the rule day, by the appellants; because it is urged that the cause of action contained no certain measure of what is due the

* Decision rendered, January 4, 1887.

appellees on their policy of insurance issued by the appellants, to which the appellees could safely swear.

By the sixth section of the act of 1864, chapter 6, it is provided that every suit when the cause of action is a contract, whether in writing or not, or whether express or implied, shall stand for judgment or trial on the first day of the term, or at the return day next succeeding the entry of appearance of the defendant, whichever shall first happen, unless the time shall be extended by the court on cause shown.

By the seventh section if the plaintiff makes affidavit or affirmation to his claim on filing his declaration at the bringing of his action, in accordance with section 8 of the act, he is entitled to judgment on the first day of the term, or at the return day next succeeding the appearance of the defendant, whichever shall first happen or occur, unless the defendant files a good plea in defense, verified by himself or some one on his behalf, by oath or affirmation. The eighth section requires the affidavit or affirmation of amount due over and above all discounts to accompany the declaration at the bringing of the suit, and that the cause of action on which the claim arises shall also be filed.

In *State, Use of Bouldin, vs. Shibet* (31 Md., 37) this court said that this eighth section is substantially the same as that of the attachment law in section 4, article 10 of the Code, and that the general rule is that unliquidated damages cannot be recovered by attachment unless the contract itself affords a certain measure or standard for determining the amount of the damages, because in such case the amount of indebtedness cannot be averred by affidavit. The true test, therefore, is whether the claim can be sworn to: *Wilson vs. Wilson*, 8 Gill., 192; *Warwick vs. Chase*, 23 Md., 154; *Fisher vs. Consequa*, 2 Wash. C. C., 382; *Clark, Ex'r of Wilson*, 3 id., 562; *Williams, Garnishee, vs. Jones*, 38 Md., 555. In the last-cited case, the suit was upon a bond for the payment of money, but the precise sum the bond was intended to secure was not stated in the condition, but as the elements or data necessary to enable the amount due to be ascertained were in the instrument, it was held sufficient to justify the plaintiff in verifying the same by his oath.

The appellees contend that the policy of insurance, which is their cause of action, and was filed with their declaration, together with an affidavit of the amount of their loss, does contain a certain measure and standard for ascertaining their loss, so that the same could be verified by them by their oath, as was done. The policy

was for \$4,500 on two engines and boilers, hoisting-cranes and cargo of stone. The risk was confined to "the Delaware River and bay and tributary waters as far as the Breakwater."

The clauses of the policy relied on as supplying a certain measure and method of ascertaining the loss sustained and payable by the insurers read as follows: "Immediate notice of the occurrence of all losses shall be given to this company by the assured; and within thirty days from the time the same may happen, the said assured shall deliver to said company proof of loss and interest, and as particular an account as the nature of the case will admit, stating the causes, if known, the extent of loss, and the nature of the interest of assured in the property; also, what other insurance or insurances—if any—there was on the property at the time of said loss; which statement shall be in writing, signed by the assured and verified by his or their oath, and so much of said statement as relates to the cause, nature, and extent of his loss or damage shall be verified also by the master of said boat or vessel, or of some other person or persons having immediate charge thereof at the time the same did happen, otherwise this company will not be liable under this policy; and the amount of the loss shall be ascertained by the opening of packages when necessary, by a competent person, and separating the sound from the damaged portion, this company being liable for the loss on the damaged portion only, which shall be ascertained by appraisal by disinterested persons, or by a sale at auction as this company may prefer. The said loss or damage to be estimated according to the true and actual cash value of the said property at the place of destination on the day of the disaster; and on the property not forwarded to its destination, the said loss or damage to be ascertained in the same manner, and the freight from the place of disaster to the place of destination deducted. In all cases of loss or damage there shall be deducted in lieu of average, the sum of one hundred dollars on salt, fifty dollars on flour, and seventy-five dollars on losses on grain and general merchandise. In the case of wet grain, the dry portion of the boat—if any—to be considered as a sample of the condition and quality of the cargo when shipped.

"And the said Orient Mutual Insurance Company do hereby undertake and agree to make good and satisfy unto the said assured the loss or damage on the said goods or merchandise so laden as aforesaid, as shall happen to said goods or merchandise while at risk under this policy from causes or casualties not excepted as aforesaid, provided the sum insured is equal to or exceeds the value of the

property at risk on the day of the disaster; should the sum insured be less than the said value of the property, then the company will pay such proportion of the said loss as the amount hereby insured bears to the sound value of the property so insured. Losses payable sixty days after proofs of loss and interest have been made by the assured, and filed with the Orient Mutual Insurance Company, and in settlement all unpaid premiums or other debts due the said company are to be deducted.

"And provided further, and it is hereby agreed that if the said assured shall have already made any other insurance upon the property aforesaid not notified to this corporation and mentioned in or indorsed upon this policy then this insurance shall be void and of no effect; and in case of any other insurance on the property hereby insured, by parties other than the assured, whether prior or subsequent to the date of this policy, the assured shall not, in case of loss or damage, be entitled to demand or receive of this company any portion of the loss or damage sustained, unless said other insurance is insufficient to cover the value of the property at risk, in which event this policy will attach and co-insure to the amount of said deficiency not exceeding the sum insured herein.

"Losses or averages of each trip or voyage to be adjusted and settled separately; all sacrifices and expenses for the benefit of, or to save the vessel and cargo laden on board, and insured under this policy, arising from or necessitated by a peril insured against in this policy, are to be apportioned and paid by the several interests of vessel, freight, and cargo, according to the law and custom of general average. In case this company should pay the whole of such general-average expenses or losses, the proportion thereof due from the vessel and freight is to be guaranteed and paid to the company by the assured. Such contribution as may be due from this company toward such general-average charges or losses is to be paid without deduction of average." There are many other clauses in the policy but they do not bear on the question whether the policy contains data for the certain measurement of the loss sustained by the assured. They mainly are conditions upon which matters of defense against claim for loss might arise.

It is very certain that by this policy the appellant has prescribed a method of ascertaining the amount of the loss of which it was to be promptly notified by the assured after suffering it. That amount, ascertained in the way the policy described, is also by the very terms of the policy to be verified by the oath of the assured. If the loss

was thereby so certainly ascertainable that the assured could swear thereto for the purpose of notifying the appellant of the claim they were expected to pay within the sixty days; and which the policy promised should be done, it is difficult to see why, if the company failed to pay, the assured could not with equal propriety and safety swear to his claim, when he brought suit on it. If it has not been considered, that the means of ascertaining and calculation of the loss contained in the policy were sufficiently definite and certain to justify the claimant in swearing to the same as proof of loss and notification to the company of the extent of the loss it was under a contract to pay and make good within sixty days from the receipt of such proofs, it would hardly have been required. We do not mean, however, to be understood as regarding this requirement of the policy as conclusive of the question. That must depend upon whether the policy does supply a certain means of ascertaining the loss. We cannot see that the facts of this case materially distinguish it from the cases of *Wilson vs. Wilson* (8 Gill, 192) and *Fisher vs. Consequa* (2 Wash. C. C., 382). In *Wilson vs. Wilson*, if the flour to be delivered should not pass superfine, the difference in worth between it and superfine, "as is customary between the different qualities of flour in the place where the flour may be inspected," was the measure of damages. The attachment was sustained. Yet the plaintiff had to ascertain what was the customary difference in values, and having ascertained it, swore to it as he understood it. It would have been entirely competent for the defendant to have shown that the plaintiff's information was wrong, and that this claim was too much; but that was matter of defense. Upon the information he received according to the measure supplied by the contract, he was held justified in making his affidavit for attachment. In *Fisher vs. Consequa* (2 Wash., supra) tea of a certain quality and suited to a particular market was to be delivered the plaintiff, and on failure to deliver such tea, the defendant was to pay the difference between the tea delivered and that which was to be delivered. The plaintiff had to ascertain the quality suited for the particular market, and whether the tea delivered did suit, and what, in that market, the difference in value of the two teas was. Yet the court held that it was competent for the plaintiff, upon the information and knowledge he had acquired, to make the affidavit as to the difference in value which was due him. The principle of these cases does not seem to have been disturbed; on the contrary, they have been frequently approved. They are approved in *Warrick vs. Chase* (28 Md., 159),

where the court held that the contract then involved, did not contain a certain standard or measure for ascertaining the damages plaintiff had sustained; for the want of which agreement as to how the damages were to be measured, they were wholly unliquidated. If by the agreement of the parties a standard or method for ascertaining the damages suffered is certainly fixed, then they can no longer be regarded as wholly unliquidated, so as to defeat an attachment based on the amount ascertained in accordance with the contract, and sworn to by the plaintiff. This we understand to be the doctrine of *McAllister vs. Eichengreen* (34 Md., 54) and all the Maryland authorities. The defendant may contest the propriety of the demand made, and his liability at all, but that right does not affect the question whether the contract supplies the plaintiff a measure of damages to which he can swear, which is the test of this case falling within the provisions of the act of 1864, chapter 6.

Although the policy may be regarded, as it is contended, as a contract for indemnity, yet if the measure of the indemnity, or the certain means of its ascertainment after loss, is agreed on in the instrument, then we think the case may properly fall within the provisions of the act of 1864. Looking to the application of the rule given in the contract to the loss in this particular instance, there would seem to be no difficulty in the way of making the affidavit to the loss. The stone saved was from its nature uninjured. That which was lost had a value the measure of which was fixed by the policy. The engines, boilers, and cranes were partially damaged: the extent thereof and what it would cost to repair was certainly ascertainable by the method supplied by the policy. The actual cost of saving that which was saved was paid by the plaintiff, and the proportion of the defendants was fixed in the instrument. As already stated the oath of the plaintiff to the loss and its amount is required by the policy as preliminary to payment. This was made the basis of payment if the insurers chose to pay and not deny its correctness. Whilst they were at liberty to rely on the failure of the plaintiff faithfully to pursue the terms of the policy in ascertaining the loss, or to defend on the ground of negligence of plaintiffs occasioning the loss, or for misrepresentation, or the application of some other clause of the policy to defeat the claim, the bona fides and genuineness of such defense would have to be sworn to in order to entitle the defendants to be heard, if the case falls under the act of 1864, and the plaintiff's claim was properly sworn to and might be so under the law. The plaintiff, when he brought his suit, filed

his declaration, and with it the policy, his cause of action, with an affidavit of the amount claimed to be due under it, and also the appraisement made by the adjusters. All this care in the bringing of this action was or ought to have been notice to the defendants that the provisions of the act of 1864 were invoked. This was followed by motion for default for want of appearance. Appearance was made and plea was filed, but without oath as the statute required. Thereby the plaintiff acquired the right, under the statute, to a judgment by default, which was entered, and for the striking out of which no sufficient reason has been shown. Whether the court below had adequate or proper evidence for extending the judgment as was done is not before us, and the case in 10 Johns., 498, has no application. There was no appeal from the final judgment, but only from the overruling the motion to strike out the judgment by default. If that was justifiably entered, it was admitted by appellants the judgment as extended must stand.

Judgment affirmed.

SUPREME COURT OF ALABAMA.

Appeal from Circuit Court, Limestone County.

COMMERCIAL FIRE INS. CO.)

vs.)

ALLEN ET AL.*

A party-wall agreement with an adjoining proprietor held not to cause a forfeiture of a fire policy on the ground that, in consequence thereof, the insured's interest in the property was "other than the entire, unconditional, and sole ownership," especially as the agent through whom the policy was issued lived in the town where the property was situated, and must have known of its condition.

An insurance agent cannot be considered as the agent of the insured in any matter connected with the issuing of the policy.

An offer by an insurance company to pay the loss, except upon certain things claimed not to be covered by the policy, is a waiver of proofs of loss, and gives the insured the right to sue at once, without waiting for the lapse of sixty days provided in the policy.

A fire insurance policy insuring a building, but expressed not to cover "fences and other yard-fixtures, sidewalks, store furniture and fixtures," held to cover a wooden awning in front of the building, but not shelving in the building, or an office boarded off at one end of the interior.

Under a fire policy giving the insurer the right "to repair, rebuild, or replace any property lost or damaged with other of like kind and quality," making repairs is not a full defense to an action, unless by the repairs, the property is made as serviceable and valuable as it was before the burning.

Under a policy providing that the cash value of the property destroyed or damaged shall not exceed what would be the cost to the assured of replacing it, and, in case of depreciation from use or otherwise, a suitable deduction to be made from the cash cost of repairing, the measure of damages is the cost of repairs, if by repairs the property will be made as valuable as before, and not more so; but if by repairs the property will be made more valuable than before, or less so, then a corresponding deduction from, or addition to, the cash cost of repairing must be made.

* Decision rendered, January 31, 1887.—From *Southern Reporter*.
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In an action on a fire insurance policy, counsel for plaintiffs, in his concluding argument to the jury, said that the ancestry of plaintiffs was well known to counsel, and to every one else who had lived in the community with them; that their honor, integrity, honesty, and truthfulness, and that of their descendants, had never been called in question until this soulless corporation, defendant in the case, had charged one of their descendants with falsehood, fraud, and misrepresentation. *Held*, objectionable language.

A tender conditioned upon the signing of a receipt in full, or not followed up by bringing the money into court, is not good.

Action on policy of fire insurance.

This action was commenced April 24, 1882, by appellees, Ben Lee Allen and others, against the appellant insurance company, and claimed damages for the loss or damage to a building or store-house situate on the north side of the public square, in Athens, Alabama. The complaint was amended by filing two additional counts, May 15, 1885. The defendant pleaded (1) non assumpsit; (2) that the suit was prematurely brought, and before any right of action had accrued to the plaintiffs upon the policy of insurance; (3) that the suit was brought before the preliminary proof of loss was made by the plaintiff as stipulated in the policy of insurance sued on; (4) that suit was brought before notice of loss was given the defendant, as required by the policy of insurance sued on; (5) tender; (6) statute of limitations of one and two years as to amended complaint; (7) breach of warranty; and (8) misrepresentation. On May 15, 1885, plaintiffs moved the court to strike from the file the second, third, and fourth pleas, because they were united with pleas in bar. Upon the trial, May 15, 1885, the court granted this motion, and the defendant excepted. Trial was had upon the remaining pleas, and resulted in a verdict for the plaintiff for \$327.37, from which this appeal is prosecuted.

The policy of insurance, which was numbered 2,461, is sufficiently described in the opinion of the court. Ben Lee Allen, one of the plaintiffs, as shown by the record, states that he called upon one Abrams, the loss adjuster of the company, upon telegraphic instructions of the company, a day or two after the fire, which occurred on April 4, 1882; and "he offered me one hundred dollars damages, and said that was all he would pay. He never refused payment for want of notice, or because sixty days had not expired, nor for want of proof of loss." Said witness then wrote to defendant, claiming the damages testified to,—more than \$500,—and received a letter in answer thereto, denying liability except for articles specifically mentioned, and saying: "We have this day forwarded by express one

hundred dollars to our agent in Athens, Mr. J. H. Davis, instructing him to call and pay you the damage sustained by fire under our policy No. 2,461, on fourth inst. You will please sign the receipts in duplicate as presented by him." The \$100 was subsequently tendered to said Allen upon his signing a receipt in full for the loss under the policy, which was presented to him, but which he declined to do. Correspondence afterwards ensued between the company and him in regard to a settlement, but one was not effected.

The bill of exceptions further recites that "counsel for plaintiffs, in his concluding argument of the case, stated that the ancestry [naming them] of plaintiffs were well known to counsel, and to every one else who had lived in the community with them; that their honor, integrity, honesty, and truthfulness, and that of their descendants, had never been called in question until this soulless corporation, defendant in this case, had charged one of their descendants, Ben Lee Allen, with falsehood, fraud, and misrepresentation, in procuring the policy of insurance in this case." To these remarks of counsel the defendant objected at the time they were made, and asked the interference of the presiding judge. The counsel for the plaintiff declined to withdraw his remarks, and the presiding judge declined to interfere, and the defendant excepted.

It is not necessary to a proper understanding of the opinion of the court, to set out the many charges asked and refused.

HUMES, GORDON & SHEFFY, *for Appellants.*

McCLELLAN & McCLELLAN, *Contra.*

STONE, C. J.

The present action is founded on a policy insuring real property against destruction or damage by fire. The property is described in the policy as follows: "Brick, one-story, iron-roofed building, * * * occupied by S. Tanner & Son, family groceries, and after January 1, 1882, to be occupied by Henry Warten, and used as a family grocery store." The policy bears date December 17, 1881, and insures the property for one year. On the fourth February, 1882, the house was partially injured by the burning of a store contiguous to it, and on the twenty-fourth of the same month the present action was instituted. The insurer and the insured were not of one mind as to the extent of the property covered by the insurance. Out of this grew the contention and this lawsuit.

Attached to the building, at the front, was an awning or shed, erected on posts set in the ground, with rafters extending to and into

the brick walls, and covered with plank. This awning was constructed by the owners of the building, not contemporaneously with it, but a year later. There were in the building, and attached to it by fastenings, shelving, drawers, and an office at the rear end, fenced off by plank work. All these, such as are customary in a storehouse, were placed there by the owners, and let with the building. The insured claimed for the damage done to the awning, the shelving, and the office. The insurance company resisted this claim, and contended it was liable only for the damage done to the house itself.

Certain questions had been asked of the applicant for insurance, (Allen) and answers given, before the policy was issued; and there is a clause in the policy in the following language: "Special reference is had to assured's application on file in this office, which is their warranty, and a part hereof." In the application are the following question and answer: "Is the land on which building stands held in fee-simple or on lease? Answer. Fee-simple." The third clause of the policy stipulates that "if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, or if the building insured stands on leased ground, it must be represented to the company, and so expressed in the written part of this policy; otherwise the policy shall be void." After the building in controversy was erected, the plaintiffs sold the soil contiguous to it on the west to one Mason, and stipulated that, in building on the lot so purchased, Mason should make the west wall of the plaintiffs' house the east wall of his, inserting his joists into the wall; and, Mason's house being a two-story building, it was further stipulated that he should raise the east wall of his building on the said west wall of plaintiffs. This was done, and the property stood in that condition, and in that right, when the policy was taken out in this case, and when the fire occurred. This, it is contended for appellant, was a misdescription of plaintiffs' title and ownership, and avoids the policy.

We do not think this objection well taken. We concur in opinion with the trial court, and hold that the essential purpose of the inquiry was to learn whether the property was held by a title in fee, or by a title less valuable than a fee; and whether the property was incumbered by alien interests, liens, or other incumbrances, which lessened the value of the applicants' insurable interest. The easement or servitude previously conveyed or granted to Mason was but

carrying into effect the usual method of building in cities and towns by coterminous proprietors. It is shown that Ainsworth, appellant's agent at the time the policy was applied for and issued, resided in the town of Athens, where the property is situated. With him the assured negotiated, and effected the insurance. He was familiar with the premises, and must have known in what manner the houses were connected together, and that the east wall of Mason's upper story rested on the west wall of the house he was insuring. He was the agent of the insurance company, and we have no sympathy with any attempt to transform him into an agent of the applicants in any service connected with the issue of the policy. With him alone the assured had dealings; and it would be an anomaly if we were to hold he was their agent, and not the agent of the insurance company with which they were negotiating. If he did not represent the corporation, it had no representative, and yet agreed to the terms of a solemn contract. Such shifting use of a paid employe finds no sanction in that sturdy morality which should underlie every system of jurisprudence: *Piedmont & Arlington Ins. Co. vs. Young*, 58 Ala., 476; *Insurance Co. vs. Wilkinson*, 13 Wall., 222; *De Lancey vs. Insurance Co.*, 52 N. H., 581; *May, Ins.*, § 143; *Royley vs. Empire Ins. Co.*, 36 N. Y., 550. A few cases are variant from this principle: *Wineland vs. Security Ins. Co.*, 53 Md., 276; *Jenkins vs. Quincy Mutual Fire Ins. Co.*, 7 Gray, 370.

We do not think Allen's failure to disclose the fact and nature of Mason's right or easement impaired or affected the substantial truthfulness of the representation as to title: *Ætna Ins. Co. vs. Tyler*, 16 Wend., 385; *Savage vs. Howard Ins. Co.*, 52 N. Y., 502; *Washington Fire Ins. Co. vs. Kelly*, 32 Md., 421; *Couch vs. Rochester German Fire Ins. Co.*, 25 Hun, 469; *Castner vs. Farmers' Mut. Fire Ins. Co.*, 46 Mich., 15; s. c. 8 N. W. Rep., 554; *American Cent. Ins. Co. vs. McCrea*, 41 Amer. Rep., 647. We do not question the correctness of the following authorities, nor do we consider they conflict with the views expressed above. In each of them the misdescription was substantial, and materially impaired the nature of the title: *Eminence Mut. Ins. Co. vs. Jesse*, 1 Met. (Ky.), 523; *Agricultural Ins. Co. vs. Montague*, 38 Mich., 548; *Ætna Ins. Co. vs. Resh*, 40 Mich., 241; *Davenport vs. New England Mut. Fire Ins. Co.*, 6 Cush., 340; *Wilbur vs. Bowditch Mut. Fire Ins. Co.*, 10 Cush., 446; *Abbott vs. Shawmut Mut. Fire Ins. Co.*, 3 Allen, 213; *Falis vs. Conway Mut. Fire Ins. Co.*, 7 Allen, 46; *Graham vs. Fireman's Ins. Co.*, 87 N. Y., 69; *Columbian Ins. Co. vs. Lawrence*, 2 Pet., 25; *Same vs. Same*, 10 Pet., 507; *Jeffries*

vs. Life Ins. Co., 22 Wall., 47; *Ætna Life Ins. Co. vs. France*, 91 U. S., 510; *Sun Mut. Ins. Co. vs. Ocean Ins. Co.*, 107 U. S., 485; a. c. 1 Sup. Ct. Rep., 582.

We think on the uncontroverted facts shown in this record the insurance company waived the production of the preliminary proofs: *May, Ins.*, § 469; *Fland., Ins.*, 541; *Tayloe vs. Merchants' Fire Ins. Co.*, 9 How., 390; *Norwich & N. Y. Transp. Co. vs. Western Mass. Ins. Co.*, 34 Conn., 561; *Williamsburgh City Fire Ins. Co. vs. Cary*, 83 Ill., 453; *Insurance Co. vs. Sorsby*, 60 Miss., 302.

So we think the delay of sixty days after proof furnished before right of action accrues, was also waived in this case. The insurance company denied all liability to pay, except for damage done to the house proper, and offered to pay a specified sum in satisfaction of that admitted liability. This relieved the plaintiffs of the necessity of waiting sixty days before bringing suit. *Fland., Ins.*, 532; *Phillips vs. Protection Ins. Co.*, 14 Mo., 220; *Norwich & N. Y. Trans. Co. vs. Western Mass. Ins. Co.*, 34 Conn., 561; *Georgia Home Ins. Co. vs. Jacobs*, 56 Tex., 366.

On the two questions last presented the testimony was full and undisputed, and could have been charged upon without hypothesis: *Carter vs. Chambers*, MS. (present term). The circuit court, in ruling on those questions, did not and could not err to the prejudice of appellant.

The policy sued on contains this clause: "Fences and other yard-fixtures, sidewalks, store furniture and fixtures, are not covered by insurance on the building, but must be separately and specifically insured." Under this clause it is contended for the insurance company that the risk does not cover the awning, the shelving, nor the office. We think it unquestionably clear that, under the testimony in this record, each of these items must be classed as a fixture: *Thurston vs. Union Ins. Co.*, 28 Alb. Law J., 490, No. 25, December 22, 1883; *May, Ins.*, § 420; 3 Wait, Act. & Def., 376 et seq.; *Fore vs. Hibbard*, 63 Ala., 410. But the exception does not include all fixtures. It is only "store-fixtures" and "yard-fixtures" that come within the exception. The awning was not a yard-fixture. It was attached to the front of the house, we must suppose, for purpose of shade. There was no yard there to which it could be attached or affixed. It was a fixture to the house as a house, and in no sense a store-fixture; that is, a fixture attached to the store, tributary to its use as a store. The shelving and office were store-fixtures, and were not insured. The awning was a fixture, but a part of the building,

and would have passed by a conveyance of the property as a house, and would have descended to the heirs by inheritance. But, as we have said, it was not a "store-fixture," and was not excepted from the binding obligation of the insurance policy. Its removal or demolition would seem to have been justified by the attending circumstances, and, if so, the insurance company must make good the damage: 4 Wait, Act. & Def., 67; May, Ins., § 404.

A question was raised on the rule or measure of recovery. The policy provides that "it shall be optional with the company to repair, rebuild, or replace any property lost or damaged, with other of like kind and quality, within a reasonable time, giving notice of the intention so to do within sixty days after receipt of proofs herein required." The insurance company expressed no wish or intention to repair the damage in this case, and hence we need not consider this clause further than to say, if the right to repair be claimed, it will not be a full defense and compensation, unless by the repairs the property is made as serviceable and valuable as it was before the burning. The policy, however, contains the further clause, that "the cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same; and in case of the depreciation of such property, from use or otherwise, a suitable deduction from the cash cost of repairing the same shall be made to ascertain the actual cash value." It would seem there should be no difficulty in interpreting this clause. If by repairs the property can be rendered as valuable as it was before the fire, then the cost of repairs is the measure of recovery. If property had been destroyed which, from use or otherwise, had become less valuable than when new, then the cost of replacing it, less the percentage of depreciation of the destroyed article by such use, will determine the extent of the damages. If the property, after being repaired, is not as valuable as it was before the fire, then the cost of repairs, supplemented with the amount of depreciation in value, are the factors for fixing the damages. There was no error in admitting testimony as to damage to the property covered by the policy.

The record affirms it contains all the evidence. It is shown that, when the \$100 was tendered, the execution of one of two receipts, each expressing to be in full of certain claims of insurance, was made a condition of its payment. There is no proof that the money was brought into court. Either of these objections was fatal to the defense attempted under the plea of tender: 2 Pars. Cont., *644, *645;

Code 1876, § 4,698; *Daughdrill vs. Sweeney*, 41 Ala., 310; *Alexander vs. Caldwell*, 61 Ala., 543.

The remarks of counsel in the concluding argument were objectionable, and the court erred in not arresting that line of argument when thereto requested: *Wolffe vs. Minnis*, 74 Ala., 386; *Cross vs. State*, 68 Ala., 476; *East Tennessee, V. & G. R. Co. vs. Bayliss*, 75 Ala., 466; *Same vs. Carloss*, 77 Ala., 443.

We consider it unnecessary to comment on what is claimed as an award. Negotiations were conducted afterwards, and it was not insisted on as settling the controversy.

We have now noticed every material error which was raised in the court below. We will not attempt to apply the principles to the numerous exceptions and many assignments of error. Reversed and remanded.

SUPREME COURT OF PENNSYLVANIA.

Error to the Court of Common Pleas, No. 2, of Philadelphia County.

MUTUAL FIRE INSURANCE CO. }

vs. }

BLOCK.* }

Block in New York applied to Heller, an insurance broker, to place insurance on his stock and fixtures. Heller passed the application over to Anderson, another broker, who in turn sent it to Harrisburg, to one Huntzinger, the general agent of a Philadelphia insurance company. Huntzinger placed the risk with his company, who sent him a policy in Block's name. This policy contained conditions to the effect that the premiums must be paid at the office of the company in Philadelphia, or to an agent expressly authorized in writing to receive them; also that in case of loss there must be furnished a certificate under the hand and seal of the chief of the fire department, stating that the assured had honestly sustained the loss; and finally, that the policy would not be valid "until countersigned by Huntzinger at Harrisburg." Huntzinger countersigned the policy and forwarded it to Anderson, who gave it to Heller for Block. On January 14, 1881, Heller paid the premium, which he had previously received from Block, to Anderson. That night the insured property was damaged by fire. On January 25, 1881, Anderson forwarded the premium, with others, to Huntzinger, in the regular course of business between them. The latter refused to receive it, and the company declined to pay the loss. In a suit by Block on his policy, *held*, that he was entitled to recover. Huntzinger was the duly accredited agent of the company and did not exceed his authority in countersigning and forwarding the policy. He was also Anderson's principal. The company knew the risk was in New York and that Huntzinger must place it through an agent in that city. It was not error, therefore, for the court to refuse to charge that the company was not liable unless the premium was paid in Philadelphia or to an agent authorized in writing to receive it; but to leave it to the jury, whether the course of dealing by the company did not justify the belief that Anderson was duly authorized to receive the premium.

Block did not furnish the certificate from the chief of the fire department, because that officer refused to become a party to adjustments. *Held*, that this was immaterial, and that the company had no right to require such a certificate.

Debt, by David Block against the Universal Fire Insurance Company of Philadelphia, on a policy of insurance, containing, *inter alia*,

* Decision rendered, October 6, 1886. —From *Eastern Reporter*.

the following conditions: "This company shall not be liable by virtue of this policy, or any renewal thereof, until the premium be actually paid to the company at its office in Philadelphia, or to an agent expressly authorized in writing by the company to receive the same." . . . "A particular statement of the loss shall be rendered . . . setting forth . . . a certificate under the hand and seal of the chief of the fire department or other officer having charge of the investigation of fires . . . stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has honestly sustained loss on the property herein described to the amount which such officer shall certify."

In November, 1880, Block, who was in business in New York City, employed one Heller, an insurance broker of the same place, to obtain insurance upon certain stock and fixtures in his factory, on Bayard Street. Heller took the application to S. R. Anderson, also an insurance broker, and the latter forwarded it to B. K. Huntzinger, who was the general agent of the defendant company, in Harrisburg. Huntzinger sent the application to the main office in Philadelphia, where the policy in suit was written, November 13, 1880, and returned to Huntzinger. He countersigned the policy, under a provision thereof requiring him to do so, and sent it back to Anderson in New York, to collect and forward the premiums to him at Harrisburg, according to the usual course of trade between them. Anderson delivered the policy to Heller for Block, and Heller, who had previously received the premium from Block, paid the same to Anderson on the morning of January 14, 1881. That night a fire occurred which resulted in damage to the insured property.

On January 25, following, Anderson forwarded the premium, with several others, to Huntzinger, it being his custom to retain premiums for a week or two, or even for a month, and then to send Huntzinger several at once. The latter, however, returned this premium to Anderson and informed him that he could not accept it.

Block then employed an adjuster in New York named Ettinger, to prepare his proofs of loss, and represent him in the settlement. A proof of loss was sent by Ettinger to the company defendant, upon the receipt of which the president wrote to Block: "It (the proof) is not in any respect in accordance with instructions in printed part of Universal Fire Insurance Company policy, No. 9,358, for making proof of loss, and we shall not recognize it as a proof of loss." To

this letter a reply was received from Ettinger in which, after stating that Block had handed it to him, he said: "Should the one point though bother you, that you want the certificate of the chief of the fire department, or other officer having charge of the investigation of fires, then I beg leave to state to you that my friend, Mr. Sheldon the fire marshal of this city, refuses blank out to have his official capacity used for the purpose of adjusting losses. Your paragraph in this respect becomes null and void, and I doubt whether Mr. Sheldon has got the right to furnish you the remotest explanation of a fire, as you are an out-of-town corporation, and not a tax-paying company under the jurisdiction of the State of New York." There was no further correspondence and Block then brought this suit.

The defendants submitted the following points:—

(1) "That under the terms of the policy in suit the company defendant would not be liable thereon until the premium had been actually paid to the company at its office in Philadelphia, or to an agent expressly authorized in writing to receive the same." Refused. [Second assignment of error.]

(2) "That there is no evidence in this case that the premium was paid prior to the alleged loss of the plaintiff, so as to make the company liable therefor. Refused. [Third assignment of error.]

The court—"They (the jury) may inquire whether the defendants had not, by their course of dealing, justified the belief that Anderson was duly authorized to receive the premiums on their behalf, and, if such were the case, the want of written evidence would not necessarily operate as a defense." [Fourth assignment of error.]

(3) "That the furnishing by the assured of a certificate under the hand and seal of the chief of the fire department, or of a magistrate or justice of the peace, as required by the third section of the seventh condition of the policy, was, unless waived by the company, a condition precedent to the right to recover." Refused. [Fifth assignment of error.]

(4) "That there is no evidence in this case of a waiver of the condition which required a certificate under the hand and seal of the chief of the fire department, magistrate, or justice of the peace, to be furnished the company as part of the particular account or proofs of loss." Refused. [Sixth assignment of error.]

The court—"The court leaves it to the jury to say whether the want of a certificate under the hand and seal of the chief of the fire

department, magistrate, or justice of the peace, has been excused or waived." [Eighth assignment of error.]

Verdict and judgment for plaintiff, whereupon the defendants took this writ of error.

JAMES C. SELLERS, *for Plaintiffs in Error.*

GEORGE P. RICH and MAYER SULZBERGER, *for Defendant in Error.*

GORDON, J.

The material assignments of error, in this case, with the exception of the third and fourth, may be disposed of in two general classes:—

1. That relating to the waiver of the condition of the policy which exempts the company from all liability until the actual payment of the premium either at its office, or to an agent authorized in writing to receive the same.
2. That which embraces the rulings of the court on the effect and character of the proofs of loss.

We will first dispose of the third and fourth assignments, in which complaint is made of the learned judge of the lower court, that he refused to say to the jury there was no evidence that the premium was paid prior to the alleged loss, so as to make the company liable therefor, and that they were instructed to inquire whether the defendant had not, by its course of dealing, justified the belief that Anderson was authorized to receive the premiums on its behalf, and if such were the case the want of written evidence would not necessarily operate as a defense. We cannot agree that in either of these exceptions the court below has been convicted of error. As to the first, the evidence is that Block paid the required premium to Heller, his broker, from whom he received the policy before that instrument came into his possession, and if we are to believe Anderson's written receipts, he received this money on and before the 14th of January; then from Anderson it passed to Huntzinger in the shape of a check, but as that came to hand after the fire he refused to receive it. The next question involves not only the fourth assignment, but also the second, and may, therefore, be discussed together with them. As we have seen, Block paid the required premium, and in due course received his policy. In looking at the face of that policy he would discover that it was issued in consideration of the premium which he had paid, and though he might have discovered the condition that it would not be effective until the amount of that premium was paid into the treasury of the company, or to its agent,

yet he might also observe this significant paragraph, "But this policy shall not be valid until countersigned by B. K. Huntzinger, agent at Harrisburg." Seeing this he might well and logically conclude:—

(1) That Huntzinger was the duly accredited agent of the company; and (2) The policy being countersigned by him nothing more was required to assure its validity. The regular sequence of thought must necessarily be as follows: The premium has been paid; the policy has come to hand in due course; the consideration appears on its face as though paid to the company; it has been regularly executed, and the stamp of complete verity has been given to it by the counter-signature of the company's agent. In view of all this, after the company had thus compromised itself, it seems almost idle to discuss the powers of Huntzinger, or to inquire particularly concerning their limits, nevertheless we think the evidence warrants us in saying he did not act beyond the strict line of his authority. Anderson sent the risk to Huntzinger to place in any company he thought fit; he, on his motion, placed it in the defendant company, countersigned the policy and forwarded it to Anderson for the purpose of delivery; Anderson did deliver it, received the money and sent it to Huntzinger. Who then, in these particulars, was Anderson's principal if not Huntzinger? Moreover, the company well knew that this risk was in New York, where it had no office, and that Huntzinger was necessarily doing this and similar business through an agent in that city and for that matter, through this very broker. There is no doubt at all but that there would have been no difficulty whatever about the regularity of this whole transaction had the money reached Huntzinger before the loss, but if in such case the regularity of Anderson's agency and Huntzinger's method of doing business would have been recognized, we cannot see how or on what principle consistent with honesty and fair dealing they can now be repudiated. Again, we repeat, the company knew that Huntzinger was placing its policies in New York; moreover, it knew that he could not go there personally and take contracts of insurance, for he had no power so to do because the company had no such power; such contracts must be made, if at all, in the State of Pennsylvania; how then could it be supposed that the agent was to transact such business except through the regular channels of trade, that is, by the employment of banks or brokers. Under such circumstances as these we cannot say that the court did wrong in referring the evidence to the jury, and we think it was altogether sufficient to warrant the finding of that

body. We may agree that the result would have been different had Heller, who was the immediate agent of the plaintiff, neglected to pay over the premium to Anderson or Huntzinger, for then the case would have had some resemblance to that of the Pottsville Mutual Fire Insurance Co. vs. Minnequa Springs Improvement Co. (100 Penn. St., 137), for in that case the plaintiff's own agent would have been chargeable with neglect, which could not have been attributed to the company. Here, however, there is no neglect on the part of any one. Everything was done in the regular and ordinary course of business and the defense set up must be regarded as utterly without merit. Nor can we see how the doctrine of estoppel can fail to apply in a controversy such as this. As we have seen, the counter-signing of the policy by Huntzinger, in accordance with the company's own direction expressed in writing on the face of that instrument, gave it the appearance of a valid paper, and thus Block was assured that every prerequisite had been complied with. By whose default then, if any such there was, did it pass through Anderson and Heller to the plaintiff? Intentionally and in the regular course of business the agent of the defendant issued that policy, and no attempt was ever made, as in the case above cited, to countermand or revoke it. It was then the default of the company by which Block was misled, and we are at a loss to divine by what rule of law that default can be thrown over on the assured. It is a clear case of equitable estoppel and the company must bear the consequences of its own neglect. The other point has nothing at all in it. The proofs of loss were made out by a competent adjuster, and if they were not certified by the fire marshal of New York it was because he properly refused so to do. The company had no right to require a public officer to act in the adjustment of its risks, and the neglect of the assured to even ask a certificate from that officer would have been no default. Besides this, it was the duty of the company, on the receipt of the proofs, to return them, if they were objectionable, and point out the particular defects. This it refused to do, but replied generally that they did not correspond with the printed instructions, and refused to receive them. This was not sufficient; insurance companies cannot expect thus to escape from the payment of an honest claim through technicalities which do them no harm and which they themselves can easily cure: *Beatty vs. Insurance Co.*, 66 Penn. St., 9; *Insurance Co. vs. Flynn*, 98 Penn. St., 627.

The judgment is affirmed.

SUPREME COURT OF NEW JERSEY.*

METROPOLITAN LIFE INS. CO. }

vs.

McTAGUE.†

When a life insurance policy has become forfeited by non-payment of premiums, and a "revival application" is made, asking that the policy be revived, and containing representations as to the insured during the period between the issuing of the policy and the date of the revival application, and a warranty that such representations (as well as the representations of the original application) are true, and that otherwise the insurance will be void, and containing also an agreement that the liability of the insurer is not to exist until the revival is assented to, and when the insurer afterwards assents by a written approval of the revival application, *held* (1) that, upon such assent, the original contract, with all its terms, became re-instated, and there were also incorporated into the contract, which then arose, the new terms expressed in the revival application, and thereby the representations therein contained became part of the contract, and that the truth of each was warranted; (2) that a statement in the revival application, that insured had not, during the period covered thereby, been "sick or afflicted with disease," was not necessarily to be inferred to be false from the fact that insured had a "cold;" (3) but a statement that insured had not "consulted or been prescribed for by a physician" was shown false by proof of such a prescription, although it appeared to have been given for a "cold," and the nature of the prescription did not appear.

MR. BEECKER, for *Prosecutor*.MR. BRADNER, for *Defendant*.

MAGIE, J.

The action in the district court was founded on a policy of life insurance dated April 14, 1884, whereby the Metropolitan Life Insurance Company agreed, if certain premiums were paid, to pay to Annie McTague a certain sum on the death of John McTague, her

This court, though not that of the last resort, is composed of the same law judges as the latter.—[ED. INS. LAW JOURNAL.]

† Decision rendered, June 15, 1887.

husband. The judgment of the district court was in favor of Annie McTague, and it was affirmed on appeal. It appears by the state of the case that the policy in question originally issued upon the application of Annie McTague. It was averred in the policy that the contract was made in consideration of the representations contained in the application, which was therein "referred to and made part of this contract." The policy further stipulated that, if the representations were not true, the contract should be void. By force of these stipulations, the application, and the representations thereby made, were incorporated into the completed contract of insurance, and the truth of the representations was warranted. If false, although in immaterial particulars, the contract would be avoided: *Dewees vs. Manhattan Ins. Co.*, 34 N. J. Law, 244; *Carson vs. Jersey City Ins. Co.*, 43 N. J. Law, 300, and 44 N. J. Law, 208; *Cushman vs. United States Life Ins. Co.*, 63 N. Y., 404; *Phoenix Mut. Life Ins. Co. vs. Raddin* (United States Supreme Court), 23 Reporter, 353, 7 Sup. Ct. Rep., 500; *McDonald vs. Law Union Ins. Co.*, L. R., 9 Q. B., 328.

The contract thus made became forfeited by the failure to pay the weekly premiums as agreed. Afterwards, and on February 12, 1885, Annie McTague signed and delivered to the company a written application called a "Revival Application." It described the forfeited policy, admitted that the weekly premiums had remained unpaid for thirty-one weeks, and contained the following, viz.:—

"The undersigned assured hereby declares and warrants that the life heretofore insured under the above-numbered policy has not, since said policy was issued, been sick, or afflicted with any disease, or met with any accident, or consulted or been prescribed for by any physician, and that the habits of said insured are sober and temperate. Said policy having lapsed, the undersigned desires to renew the same, and herewith pays the premiums in arrears, with the understanding that no liability exists on the part of the company until said company at its home office in New York City, shall have assented to the revival of said policy, and so notified its agent first above named; nor shall said policy be deemed to be in force, unless, upon the date of its revival by the company at its home office as aforesaid, the said insured shall be alive and in sound health. It is further warranted that the statements in this and the original application are in all respects true; otherwise the insurance will be void, and all payments made will be forfeited to the company.

"Agent's or physician's signature, _____.

" (After satisfying himself of the identity of the proposed insured.)

" First class, should be unexceptionable lives; second class, lives in which the unfavorable circumstances are very slight; third class, lives in which the unfavorable circumstances are serious, and require a considerable reduction in the amount proposed, as an equivalent for the increased risk of the assurance; fourth class, lives where the objections are such as to render it inexpedient to undertake the assurance."

The company assented to the revival of the policy by an approval of the revival application annexed thereto, and signed by one of its officers. It notified the agent referred to, and received the premiums in arrear, and those which subsequently fell due up to the death of John McTague, which occurred September 9, 1885. It now disputes its liability upon the policy on the ground that statements contained in the revival application were untrue.

The question thus raised requires us to determine what contract existed between the parties after the policy was revived, and the relation to that contract of the revival application and its representations. The forfeiture of such a policy by non-payment of premiums may be waived, and such waiver will generally be inferred from a receipt of the premiums after forfeiture. Upon such a waiver the pre-existing contract doubtless becomes re-instated upon its original terms. Such a forfeited policy may also be expressly revived, and in such case the revival may be upon such terms and conditions as the parties agree to. When an express revival is made upon the statements of the original application, it has been made a question whether the truth of those statements is to be tried by the circumstances existing at the time of the original application, or at the time of the revival: *Bliss, Life Ins.*, § 194. Mr. May says that the authorities do not agree; some taking the view that a revival makes a new contract, and others that it merely continues the old one. He expresses his opinion that special circumstances seem to control the decision according as they indicate the intent of the parties: *May, Ins.*, § 190. In like manner the parties may doubtless agree to revive the lapsed contract upon new terms and conditions, or upon its original terms and conditions, with such additional terms as they mutually agreed to incorporate therewith. Whether the parties merely re-instate the old and forfeited policy, or create a new contract on new terms, or revive the lapsed contract with additional terms, must be determined from the circumstances. In the case before us, it is clear, in my judgment, that the intent of the parties was to re-

vive the forfeited policy, with all its original terms, by a new contract, which incorporated into it additional terms. This appears from the circumstances. The original policy was based on a written application containing statements as to the insurability of the person whose life was to be insured. These statements were expressly incorporated into the contract, and warranted to be true. When forfeiture had occurred, the beneficiary in the lapsed contract applied in writing for its revival. The application contained statements as to the insurability of the person whose life was insured, covering the period between the issuing of the original policy and the date of the revival application. It further contained an agreement that the company's liability should only re-arise upon its assent to the application. It contained an express warranty of the truth of the representations then made, and an agreement that if they, or the representations of the original application, were not true, the contract should be void. This written application was assented to by the written approval of the company, and thereby a new contract between the parties was made, reviving the old policy with all its terms, and incorporating into it the additional terms expressed in the revival application. By these means the representations contained in the revival application became part of the completed contract between the parties, and their truth was warranted. The falsity of any of them will avoid the contract.

Two representations in the revival application are alleged to have been false. The first was that which averred that John McTague had not, since the policy was issued, been "sick or afflicted with any disease." The district court found as a fact that he had, during that period, had a "cold." The common pleas held that the statement of the application was not thereby shown to be untrue. In this I think there was no error. There was nothing in the mere fact found that required the inference that the insured life had been "afflicted by disease" or even "sick." These terms are not to be construed as importing an absolute freedom from any bodily ailment, but rather of freedom from such ailments as would ordinarily be called disease or sickness. Where a lapsed policy was revived on condition that the insured was in good health, it was held that the phrase was not to be construed as meaning an absolute exemption from any physical ill; and, as the policy had issued on an application showing the then state of health of the insured, it was further held that the condition was satisfied by the insured being in a state of health relatively like that represented in the original application :

Peacock vs. New York Life Ins. Co., 20 N. Y., 293. See, also, Cushman vs. United States Life Ins. Co., 70 N. Y., 77. Whether this view be approved or not, I am of opinion that in the absence of proof that the "cold" referred to produced disease or sickness, the courts below rightly held that the falsity of the statement in question was not shown. Nor do I think that the fact that the insured had been prescribed for by a physician necessarily required the inference that the cold produced either disease or sickness.

The other statement alleged to be proved false is that which averred that John McTague had not, within the period between the issuing of the policy and the date of the revival application, "consulted or been prescribed for by a physician." The fact found by the district court was that a physician had been called on by John McTague, or had visited him, and had prescribed for him for the "cold." The common pleas, in their opinion before us, declared that this fact did not show the representation to have been false, because it did not appear what sort of a prescription the doctor gave, —whether one compounded by a druggist, or made up of some common remedy. But it is obvious that this circumstance cannot be of the least importance in determining the truth or falsity of the representation in question. That representation did not aver a condition of health, or that it was requisite or proper to consult a physician. It averred that he had not consulted a physician, or been prescribed for by a physician. The fact found contradicted this averment, whether the consultation and prescription related to a real disease or an apprehension of disease. Indeed, so material does such a representation seem to be to the contract proposed by the application that, in my judgment, if made falsely and knowingly, it would avoid the contract. But the materiality of the representation in this case is not in question; for, as we have seen, its truth is warranted. Its falsity appears from the fact found.

The result is that the contract was avoided, and the court below erred in rendering judgment thereon. The judgment must be reversed.

COURT OF APPEALS OF NEW YORK.

STONE

vs.

FRANKLIN INS. CO. OF BOSTON.*

The policy was procured by a broker from the agents of the company. Subsequently the latter notified the broker that the company "desire to cancel the policy. * * The same will be held binding until the 28th inst. 12 o'clock noon. After that date the company will not be liable for any loss." The broker had acted for the company for two years in procuring its insurances which were left to his discretion as to companies and rates, he apparently retaining the policies. No objection that he was not authorized to receive the notice was made by the broker at the time.

Held, That where the broker was debited for the premium in his account with the agent and no cash had been paid, no tender of unearned premium was necessary.

Held, That under the circumstances the broker was the authorized agent of the insured to receive notice of cancellation.

BENNO LOEWY, *for Appellant*.

OSBORN E. BRIGHT, *for Respondent*.

EARL, J.

On or about the eighteenth day of February, 1881, the defendant issued a policy insuring certain property of the Standard Tinware Company of the city of New York, to the amount of \$1,500, for one year from the sixteenth day of February, 1881. The policy contained this clause: "To protect itself against such increase or change of the risk as may not, under the above conditions, render this policy void, the company reserves to itself the right at any time, and for any cause, to return the assured the unexpired premium pro rata, which shall have the effect to cancel and annul this policy." And

* Decision rendered, May 10, 1887.

also the following clause: "It is a part of this contract that any person, other than the assured, who may have procured this insurance to be taken by this company, through its regularly appointed agents, shall be deemed to be the agent of the assured named in this policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." The insurance was procured through an insurance broker named Frank from Langford & Co., who were agents of the defendant. The premium was never paid; but, by the course of business between Langford & Co. and Frank, they allowed Frank to take insurance, and pay when it suited his convenience. On the twenty-sixth day of February, Langford & Co. sent to Frank this notice:—

DEAR SIR:—The Franklin Insurance Company of Boston desire to cancel their policy No. 9,190, covering property of Standard Tinware Co., Nos. 394 and 396 1st Av., N. Y. The same will be held binding until the twenty-eighth inst., 12 o'clock noon. After said date the company will not be liable for any loss under said policy.

Yours, respectfully.

This notice came to Frank's hands about 9 o'clock A. M. on the 28th, and in the evening of the same day the property insured was damaged by fire to the extent of \$4,600. Six other insurance companies had policies upon the same property. On the sixteenth day of June, 1881, the Standard Tinware Company assigned its claim against the defendant upon its policy to the plaintiff, and in February, 1882, he commenced this action. He claims that the policy was in force at the time of the fire, while the defendant claims that it was effectually canceled before the fire.

The plaintiff contends that the cancellation was ineffectual, because at the time of the notice of cancellation a pro-rata share of the premium was not returned. But the premium had never in fact been paid. If it could, in any sense, be treated as paid, it was so paid by the credit given to the broker Frank. The defendant had never actually received anything, and therefore it had nothing to return. If the premium could be paid by the credit, so it could be restored by the cancellation of that credit, and after the defendant gave the notice canceling the policy its charge against Frank or the tinware company was thereby canceled. If it could thereafter enforce payment of the premium against any one, it would have been only a pro-rata share thereof for the time intervening between the sixteenth and the twenty-eighth days of February, at noon, when the cancellation took effect. It was the agreement between the parties to the insurance that the insurance company

should have the right to cancel the policy, and it was certainly not contemplated that it should make a present to the insured in case the premium had not been paid as a condition of its right to cancel. We do not think, therefore, that the contention is sound that the cancellation was ineffectual on account of the non-return of the pro-rata portion of the premium.

It is further claimed on behalf of the plaintiff that Frank had no authority to receive this notice of cancellation, and that notice to him was not notice to the insured. We are of opinion that, upon the undisputed evidence, Frank was so far the agent of the tinware company that notice to him was notice to that company. He had been the agent of the tinware company for about two years, through whom it procured insurance upon its property from various companies, in all to the amount of \$10,000. It does not appear that he received any particular instructions as to the companies from which he was to receive insurance, or as to the rates of premium or the amount to be insured by any particular company. It is inferable that all these matters were left to his discretion. After the fire, Scheider, the president and general manager of the tinware company, did not know how much insurance the company had, nor what policies it held, until he called upon Frank the morning after the fire, and obtained the information from him. The defendant's policy, and probably all the other policies, remained in the possession of Frank until after the fire. Frank, when he received the notice of cancellation, retained the same, and in no way objected that he was unauthorized to receive the notice; and when Scheider called upon him the next morning after the fire he informed him of the receipt of the notice, and he in no way questioned Frank's authority to receive it. On the afternoon of the same day Langford, one of defendant's agents, called upon Scheider, informed him that the policy was canceled, and thereupon Scheider surrendered it to him, without objection, as a canceled policy. On the day after the fire formal notice of the loss, and in about two weeks after the fire formal proofs of loss, were served upon all the other companies, but not upon the defendant. In the proofs of loss thus served the insurances in the other six companies were specified, and the loss was apportioned among them in proportion to the amounts respectively insured by them, and one of the companies specified in the proofs paid to the tinware company its share of the loss as thus determined. In those proofs the defendant was not named among the insurance companies having policies upon the

property. No claim of liability against the defendant on its policy was made until about three months after the fire, and no proofs of loss were served upon the defendant until about three months and a half after the fire. From all these facts, including the stipulation in the policy above set out, it is clear that Frank was understood by the parties to be the general agent of the tinware company to procure and deal with this insurance. During more than three months after the fire his authority to that extent seems to have been conceded by the tinware company, and was not questioned by any one. If upon this evidence the jury had found that Frank was not authorized to receive the notice, their verdict would have been so far contrary to the evidence that it would have been the duty of the trial judge to set it aside.

It is true that Scheider testified that Frank was simply the broker whom he authorized to get so much insurance, and that he did not consider him his agent, and that Frank testified that he had nothing to do "but to place the business" (meaning probably to perfect the insurance) as Scheider ordered him to do. But these were mere expressions of opinions by the witnesses while testifying, which in no way impaired the force and significance of the other evidence, or changed its legal effect. It is a matter of some significance that nothing was said about the extent of Frank's agency in the charge of the judge, and he was not requested to submit the facts in reference to such agency to the jury. If Frank had no authority, except as a broker, to procure this insurance, and the defendant had been obliged to rely solely upon the clause in the policy above set out to establish his agency, then his case would have been in that respect like the case of *Hermann vs. Niagara Fire Ins. Co.*, 100 N. Y., 411. But the evidence bearing upon Frank's agency distinguishes this case from that. Certainly, so long as Frank held the policy, and it was carried upon his credit, and not delivered to or accepted by the insured, notice of cancellation could be given to him, and, upon receipt of such notice, it would be his duty, as a broker, to procure other insurance. Suppose in this case the notice had been given to him within one hour after the policy was delivered to him, would any one doubt that the policy would have been thereby effectually canceled, and that it would have been his duty at once to procure other insurance? The fact that it remained in his possession for ten days does not affect the principle, or make any difference in his status, authority, and obligation.

The further claim is made that there was not sufficient proof that Scheider was authorized to represent the tinware company. We think the proof is ample that he was so authorized, and that he was the general manager of the company. It appears that the tinware company was the successor of Joseph Scheider & Co., and so it was printed upon the letter-heads of the company. He was its president, and acted for and represented it in all its transactions in reference to the insurance upon its property, and the adjustment and settlement of the loss. The assignment of the claim to this plaintiff was executed by him. When testifying, he spoke of the book-keeper of the company as "my book-keeper," and of Frank as "my agent," thus showing that, in his estimation at least, he was the company; and there is no hint in the evidence that any other person had authority to represent it.

From all this evidence the inference is irresistible that he was the general manager of the company, authorized to represent it, and the trial judge could properly have so determined as matter of law. We are therefore of opinion that, upon the evidence, as it appears in this record, the trial judge could, if moved thereto by the defendant, have non-suited the plaintiff. The plaintiff, therefore, has no cause of complaint of the verdict of the jury against him, or of any error in the charge of the judge. If the policy had not been canceled before the fire, and thus had remained in force, its subsequent surrender to the defendant would not have extinguished its cause of action for its loss. It is the cancellation of the policy before the fire, and that alone, which requires the affirmance of this judgment.

The judgment should be affirmed, with costs.

All concur, except Ruger, C. J., dissenting, and Finch, J., absent.

SUPREME COURT OF INDIANA.

PEARCY

vs.

MICHIGAN MUT. LIFE INS CO.*

When examined on his voir dire, a juror being asked whether he held a policy in the company, replied in the negative. It afterwards appeared that he had taken out a policy for the benefit of his wife.

Held, That the object of such an examination is to ascertain whether the juror is impartial, and it is the duty of the juror to make a full answer not concealing any material fact.

Held, That the question required the juror to state that such a policy had been taken out, and his failure to do so was misconduct which entitled to a new trial, notwithstanding his affidavit that his verdict had been influenced solely by the law and evidence.

E. P. HAMMOND and W. F. McNEIL, *for Appellant*.

W. S. HARTMAN and W. H. HAMELLE, *for Appellee*.

ELLIOTT, C. J.

The appellant's complaint is based on a policy of insurance issued by the appellee on the life of John Percy, the husband of the appellant. The appellant asks a new trial for the reason, among others, that Ezra Bowman, one of the members of the jury, was incompetent, and because he was guilty of misconduct. In the affidavits filed by the appellant it is stated that each of the jurors was asked "whether he, or any of his family, held any life insurance policy issued by the defendant," and that each of the jurors answered that neither he, or any of his family, held a policy. The affidavits filed by the appellee state that the question asked each of the jurors was, "Do any of you hold a policy of life insurance issued by the defend-

* Decision rendered, May 18, 1887.

ant, the Michigan Mutual Life Insurance Company?" and that the jurors were not asked, "Do you, or any member of your family, hold such a policy?" It was further shown that Ezra Bowman had taken out a policy on his life for the benefit of his wife, that the policy was in force at the time of the trial, and that the fact that such a policy was issued was unknown to the plaintiff and her attorneys until after the trial. In the affidavit filed by Bowman, he states that the question asked was, "Do you hold a policy of life insurance issued by the Michigan Mutual Insurance Company?" but he does not deny that he had taken out a policy for the benefit of his wife. He and the other jurors swear that, in rendering their verdict, they were influenced solely by the law and the evidence.

It is of high importance to a litigant that the triers of his cause should be impartial and disinterested men, and the law makes careful provision for securing him this right. In speaking of this right, the court of appeals of New York said: "The object of the law is to procure impartial, unbiased persons as jurors. They must be omni exceptione majores. They must have no interest in the subject-matter of the litigation:" *Diveny vs. City of Elmira*, 51 N. Y., 506. The Supreme Court of Nebraska declared a like doctrine in *Ensign vs. Harney* (15 Neb. 330, 48 Amer. Rep., 344; 18 N. W. Rep., 73), where it was said: "Unless fair-minded, unbiased jurors can be selected, a trial becomes a mere farce, dependant, not upon the merits of the case, but upon extraneous circumstances, such as the bias, prejudice, or interest of the jury. To determine the competency of a juror, an oath is administered to him, and he is required to answer all questions touching his qualifications as a juror, not generally, but in that particular case. Great latitude is allowed in such examinations, and, if it appears probable that the juror is not indifferent between the parties, he is excluded." Other courts have asserted a similar doctrine. Thus in *Bradbury vs. Cony* (62 Me., 223), the court said: "In the trial of causes, the appearance of evil should be as much avoided as evil itself. It is important that jurymen should be devoid of prejudice. It is hardly less so that they should be free from the suspicion of prejudice." So in *Melson vs. Dickson* (63 Ga. 682, 36 Amer. Rep., 128) it was said: "A big part of the battle is the selection of the jury, and an impartial jury is the corner-stone of the fairness of trial by jury." The principle is so plain and just that it needs little more than a bare statement, and we refrain from further reference to authorities, although they are very abundant.

The examination of a juror on his voir dire has a twofold purpose, namely, to ascertain whether a cause for challenge exists, and to ascertain whether it is wise and expedient to exercise the right of peremptory challenge given to parties by the law. It is often important that a party should know the relation of a person called as a juror to his adversary, in order that he may interpose a challenge, for cause, or exercise his peremptory right to challenge. It is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact, nor concealing any material matter, since full knowledge of all material and relevant matters is essential to the fair and just exercise of the right to challenge either peremptorily or for cause. A juror who falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, is guilty of misconduct, and such misconduct is prejudicial to the party, for it impairs his right to challenge. In this instance the appellant had a right to a full and truthful answer from Bowman, and it was his duty to make that answer without evasion, equivocation, or concealment.

We think that the question asked the juror required him to answer as to the policy taken out on his own life for the benefit of his wife. This is our conclusion upon the assumption that the question was that which the appellee maintains it was. It was not incumbent upon the appellee to minutely cover, by a long series of specific questions, all phases of the subject, but it was enough to ask such a question as would indicate to the mind of a fair and reasonable man what information the examining counsel sought to elicit. It seems clear that such a question as that asked Bowman ought to have drawn from him the fact that he had taken out a policy on his own life for the benefit of his wife; for the question certainly indicated that information as to his interest in the company, as well as his connection with it, was sought by the counsel conducting the examination.

The authorities support our conclusion that if the general question fairly arouses the juror's attention, and directs it to the information desired, it is enough, without specific questions covering minute phases of the subject: In *Rice vs. State* (16 Ind., 298) the juror was asked as to whether he had formed an opinion, and he answered that he had not; but no inquiry was made as to whether he had served on the grand jury which found the indictment, and yet it was held, on proof that he had been a member of the grand jury, that the accused was entitled to a new trial. The general

question here under discussion was well and elaborately discussed in the case of *Block vs. State*, 100 Ind., 357. In that case no inquiry was made as to whether any of the jurors was a deputy of the prosecuting attorney, and yet a new trial was ordered on its being shown that one of the jurors was the prosecutor's deputy: In *Lamphier vs. State* (70 Ind., 317) a juror was asked generally as to whether he was a freeholder or householder, and, by reason of an erroneous opinion, he gave an incorrect answer, yet it was held that the accused was entitled to a new trial.

It is true that, in exact technical strictness, the policy belongs to the beneficiary: *Wilburn vs. Wilburn*, 83 Ind., 56; *Pence vs. Makepeace*, 65 Ind., 345. But in the examination of jurors it is not essential that counsel should employ terms with strict accuracy, for all that need be done is to fairly call the juror's attention to the subject on which information is sought, and indicate to him, with reasonable certainty and clearness, the purpose of the question. It is common for one who has his life insured for the benefit of his wife or family to regard himself as holding the policy. Nothing, indeed, is more common than for one who has insured his life for the benefit of his family to speak of himself as having the policy, and very few men, if asked the question if they had a policy in a designated company, would think of giving any other answer than that they did have such a policy, even though the policy was payable to some one else. In a broad sense, a man whose life is insured has a policy, although the beneficial interest in it may be in another person, for the policy which expresses the contract is on his life, and he it is that the company insures. We regard it as quite clear that the question asked *Bowman* required him to answer as to a policy taken out on his own life, although that policy was for the benefit of his wife.

The statement of *Bowman* that he was influenced solely by the law and the evidence does not remedy the wrong. A juror who has deceived or misled the court or the counsel by a false or incorrect answer cannot, by a subsequent statement, repair the legal injury caused by his conduct on his preliminary examination: *Hudspeth vs. Herston*, 64 Ind., 133; *Lamphier vs. State*, supra; *Block vs. State*, supra; *Territory vs. Kennedy*, 3 Mont., 520; *U. S. vs. Upham*, 2 Mont., 170.

There are many cases in which the social and business relations between a juror and a party will sustain a challenge for cause, and the authorities go very far towards establishing a rule which would make an interest such as that held by *Bowman* a

cause for rejecting the juror: *Davis vs. Allen*, 11⁵ Pick, 466; *Thomp. & M. Jur.*, § 179; *Proff. Jury*, § 177. But we need not and do not decide whether the interest of Bowman was such as would have warranted a challenge for cause, for it is enough for the present to decide that the information sought by the question was relevant and material for the purpose of enabling the appellant to intelligently exercise her right to interpose a peremptory challenge.

We have not discussed the questions sought to be presented on the pleadings, for the reason that the record is so confused as not to present them properly, and for the additional reason that some of these questions are rendered immaterial by [the answers to interrogatories returned by the jury. Judgment reversed.

SUPREME COURT OF IOWA.

HARLE AND OTHERS

VS.

COUNCIL BLUFFS INS. CO.*

The insured had given a premium-note, which the agent afterward forwarded to the postmaster of the town where insured resided for collection, together with a notice that if not paid within thirty days from date the policy would be suspended. Unknown to the agent, the insured was himself postmaster. Within thirty days of its reception, but after the expiration of thirty days from the date, the postmaster canceled the note in presence of two witnesses and placed the amount in a separate apartment in his safe with the remark that there was another note paid. The party burned on the following day, and shortly after the identical money in the safe was forwarded to and received by the agent in ignorance of loss. The policy provided that it should not be liable while any money given for premium remained due and unpaid.

Held, That the policy-provision was valid.

Held, That the insured could not act as agent of the company in paying his own note and in waiving the policy-provision; and having concealed the fact of the loss when transmitting the money, the company was not liable.

Action on a policy of insurance against loss by fire, issued by the defendant to one French, who, after the loss, assigned his right of action to the plaintiffs. The defendant pleaded that the premium was not paid in cash, but that the insured gave two notes therefor, and that the policy provides "that no insurance, whether original or continued, shall be considered as binding until actual payment of the premiums; nor shall this company be liable for any loss under this policy occurring when any note, or part thereof, given for a part or whole of the premium, shall be due and unpaid." The defendant further pleaded that the first falling due had been paid, and that the defendant had given the notice required by statute, but that said French had failed

* Decision rendered, March 15, 1887.

pay the second note, and that the same was due and unpaid at the time the loss occurred. Trial to the court, judgment for the plaintiffs, and the defendant appeals.

SAPP & PUSEY, for Appellant.

WRIGHT, BALDWIN & HALDANE, for Appellees.

SEEVERS, J.

This action was submitted to the court upon an agreed statement of facts, the material portions of which are as follows: The note was due on the first day of April, 1884. On the first day of March, 1884, the defendant notified French in writing that the note would fall due at the time above stated, and that, unless it was paid in 30 days said policy would be suspended. On the fourteenth day of April, 1884, the defendant notified French that "said note had become due April 1, 1884; that, unless it was paid within 30 days from the date of said notice, said policy would be suspended; and in said notice also informed him of the customary short rate and expenses of said policy up to the maturity of said note;" which notice "was received by French on the fifteenth day of April, 1884." The notice is attached to and made a part of the statement of facts.

The property insured was in Kirkman, and French resided there, and was "postmaster." There was no bank at Kirkman, and it was the custom and usage of the defendant in such case to send notes for collection to the postmaster. On May 7, 1884, the defendant forwarded the note to the postmaster at Kirkman for collection, with instruction to collect the same, and to explain to the party holding the policy that it was suspended. At said time French was such postmaster (but the defendant did not know this fact), and as such received the note. The loss occurred on May 26, 1884, and on the preceding day French took the note out of his safe in his store in which he had deposited it for safe-keeping, and "canceled the same, and tore off his signature thereto, and in place thereof deposited in said safe, in the same compartment where he kept said note, and separate and apart from his other money, the exact amount in money necessary to pay his said note which he had canceled." This was done in the presence of two witnesses, to whom, at the time of so doing, French said: "Well, there is another note paid."

On the third day of June, 1884, French, "in a letter written by him to the defendant, forwarded the identical money which he had

deposited in his safe to the defendant in payment of his note, which the defendant received in payment thereof, and has since retained," but defendant did not know that the property insured had been destroyed, or of the acts and declarations of French made when the note was canceled. A copy of the letter, inclosing the money, is attached to and made a part of the statement of facts.

1. The first question discussed by counsel is whether the defendant, in sending the note for collection, made French its agent, so that it is bound by his acts, declarations, and payment made to himself. It will be observed that the note was sent to the postmaster, and a large discretion was reposed in him, for he was directed to employ the same means to collect the note "you would if it were your own." French being such postmaster, the note came into his possession, and the plaintiffs claim he paid it to himself prior to the loss. It is a fundamental rule, that where a discretion is reposed in one person by another, that the former cannot, at the same time, perform the duty incumbent on him as agent of the latter, and act for himself as principal. In such case he has antagonistic duties to fulfill, and the rights of his principal must necessarily conflict with his individual rights. In this case he might well conclude, as agent, to postpone all efforts to enforce payment of the note until he, as the maker, became insolvent. The 30 days' notice required by the statute expired on May 15th, and the claimed payment was made on the twenty-fifth of the same month. Between these dates the policy was suspended, and, if a loss had occurred, it must be conceded, we think, that there could not have been a recovery. The payment, if such it is conceded to be, would amount to a waiver. If French was the agent of the defendant, we are not prepared to say that he would not have such power.

The law will not permit a man to occupy such inconsistent positions, or represent such antagonistic rights, or perform such duties: *Story, Ag.*, §§ 210, 212. French had no authority to determine that he would waive the suspension of the policy. He, in fact, could not do so. For this purpose he was not the agent of defendant. Therefore the defendant is not bound by the payment made by French to himself, or by his acts and declarations at that time. The inquiry, it seems to us, is pertinent, why French did not at that time do what he afterwards did,—forward the money to the defendant.

2. The condition in the policy upon which the defendant relies is valid, and cannot be disregarded except as provided by statute :

Watrous vs. Mississippi Valley Ins. Co., 35 Iowa, 582; *Garlick vs. Same*, 44 Iowa, 553. The statute simply provides that the condition shall not take effect until 30 days after a specified notice has been served: Chapter 210, Laws 18th Gen. Assem.

To our mind, several exceedingly technical objections are made as to the sufficiency of the notice under the statute. We shall not stop to discuss them; deeming it sufficient to say that the notice is, in all respects, sufficient, and is clearly, in our opinion, a substantial compliance with the statute.

3. Eight days after the loss French forwarded money sufficient to pay the note to the defendant, which it received. At that time defendant had no knowledge of the loss, nor did it know that the money was forwarded by French. The letter inclosing it was signed "Postmaster, Kirkman, Iowa." Because of the non-payment of the note on or before May 15, 1884, the policy was suspended after that date. It is perfectly clear, we think, that the receipt of the money, and its retention under the circumstances, could not amount to a waiver, or re-instate the policy in force as a binding contract of insurance. The policy had lapsed solely through the fault and neglect of French. The property had been destroyed. The subject-matter of the contract was not in existence. This French knew, but the defendant did not. It received the money under a mistake of fact. Good faith and fair dealing on the part of French required that he should have notified the defendant that the property had been destroyed, and we think his suppression of such fact amounted to a fraud; and, as no one can be permitted to reap a benefit through or by means of a fraud perpetrated by him, therefore the plaintiffs cannot recover. But the failure of French to pay the premium had the effect to render the policy void, so far as the right to recover thereon is concerned. The defendant has done nothing to avoid the contract, but has been ready at all times to perform it. In principle this case is like *Harris vs. Royal Canadian Ins. Co.*, 53 Iowa, 236, 5 N. W. Rep., 124. See, also, *Pritchard vs. Merchants & Tradesman's Mut. Life Assur. Soc.*, 3 C. B. (N. S.), 622.

It may be proper to say that at least a portion of the premium, had been earned, and whether the plaintiffs are entitled to recover any portion thereof is not an issue in this case.

The district court erred in rendering judgment for the plaintiffs upon the facts as stipulated. The judgment should have been for the defendant. Reversed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS

PINGREY

vs.

NATIONAL LIFE INS. CO.*

When a party takes out a policy of insurance upon his life upon an understanding with the beneficiary therein named, who pays the premium, a valid settlement is created in favor of the beneficiary, and the insured cannot afterward surrender the policy without the consent of the beneficiary.

Where, therefore, in such a case, the insured, without the consent of the beneficiary, surrenders the policy and takes out another as a continuation of the first, but in which another beneficiary is named, the beneficiary of the first policy is entitled to the amount payable under the second policy at the death of the insured.

The fact that it is an endowment policy does not change the rule.

Actions of contract against the defendant, a company incorporated by the laws of Vermont, to recover upon policies of insurance upon the life of Franklin A. Pingrey. In several cases were heard upon agreed facts, those material belows:—

The defendant on May 25, 1874, issued its policy upon the life of Franklin A. Pingrey, upon the application of Franklin A. Pingrey, he at that time being twenty-one years of age. The policy was payable to his mother, the plaintiff, Elizabeth Pingrey, containing the following among other provisions: That the premiums paid, together with such other sums as he

* Decision rendered, May 7, 1887.—From *Eastern Reporter*.

to pay, improved annually at the average rate of interest received by the company after deducting pro-rata expenses and losses, shall amount to the sum insured, the company agrees to pay to Franklin A. Pingrey the amount of \$3,000.

In case of prior death, the said company do hereby promise to and agree with the assured, his executors, administrators, and assigns, well and truly to pay at their office the said sum insured to his mother, Elizabeth H. Pingrey, within ninety days after due notice and proof of the death of the said Franklin A. Pingrey, during the continuance and before the termination of this policy. On January 25, 1882, said Franklin A. Pingrey surrendered said policy to the defendant, who, at his request, issued to him another policy. This policy was payable to Cara L. Pingrey, the wife of said Franklin A. No new application for insurance was made by said Franklin A. Pingrey, but upon the surrender of the first policy for cancellation, the second policy was issued with the following indorsement upon it: "Original Pol. No. 9,372 was issued May 25, 1874, of which this is a continuation, and is entitled to all its benefits." Said Elizabeth A. Pingrey never consented to the surrender of the first policy. All the premiums on both policies were paid by Franklin A. Pingrey, the assured, when they came due, his mother, the said Elizabeth A. Pingrey, and his sister together furnishing him with all, or nearly all, the money necessary to pay the first premium on the first policy; no sums besides the premiums were paid upon either of said policies. Some time after taking out the first policy, said Franklin A. informed his mother that he had taken it out, but she never saw it until about two years after the time of its issue, when one day he took it from the box where he had always kept it, as he was putting away other papers, and holding it up, folded, told her that it was the policy; she never read the policy or knew its provisions, except that she understood from her son that he had taken out a policy for her benefit. The insured always kept possession of said original policy until he surrendered it to the company to be canceled as aforesaid, and he never delivered it to his mother. On February 26, 1880, the assured married Cara L. Pingrey, and on September 13, 1882, he died without issue. At the time when the first policy was applied for, the assured, being then just twenty-one years of age, was living at home with his father and mother, with whom he had lived up to that time and continued to live until his death, the family at that time consisting of his father, mother, sister, and himself. His father was an invalid, and so continued until his death, which was subse-

quent to the death of the assured, and the household expenses were paid principally by his mother, who took boarders. The assured paid no board before May, 1876; from that time until October, 1880, he paid \$3 per week to his mother, and after October, 1880, until his death, he paid her \$8 per week. From the time of his marriage, on February 26, 1880, until his death, his wife lived with him at his parents', and assisted in the affairs of the house, and lived as one of the family. The first policy was obtained after consultation between the assured and the other members of the family, with the intention of giving his mother the benefit thereof, he at that time being unmarried. It is agreed that any objection that the actions should be brought in the name of the administratrix of Franklin A. Pingrey, and not in the name of this plaintiff, is waived, and if an action would lie in any name for the benefit of the plaintiff, she shall have judgment in this action.

The superior court ordered judgment in the first action for the plaintiff, Elizabeth H. Pingrey, and defendant appealed. In the second action that court found that the action could not be maintained, and ordered judgment for defendant's costs, and the plaintiff, Cara L. Pingrey, appealed.

R. STONE, for Elizabeth H. Pingrey.

H. G. NICHOLS, for Cara L. Pingrey.

B. E. LERRY, for Defendant.

C. ALLEN, J.

The objection that the action ought to have been brought in the name of the legal representatives of the assured, if valid, is waived: *Bailey vs. New England Life Ins. Co.*, 114 Mass., 177; 19 Am. Rep., 329. Under the agreed facts it does not appear that there is any statute of Vermont applicable to the case. The question presented, therefore, is to be decided on general principles, and is an open one in this Commonwealth: *Gould vs. Emerson*, 99 Mass., 154.

It appears that before the first policy was issued there was an understanding between the assured and his mother and sister, that it should be taken out for the benefit of his mother. In pursuance of this understanding the mother and sister paid the first premium, or contributed money toward it. Afterward he told his mother that he had taken out the policy, and one day showed it to her. There appears to have been a full understanding between him and his

mother that the policy was to be taken out for her benefit, and afterward that it had been so done. In point of fact, it was made payable to her, and this was done with the intention of giving to her the benefit of it. This constituted a valid settlement in her favor. Nothing remained to be done by him to complete it. He might indeed afterward fail to pay the annual premiums. This, however does not prevent it from being a good trust. An unrevoked trust is valid, even though there is an express power of revocation: *Stone vs. Hackett*, 12 Gray, 227. In this case the assured reserved to himself no power of revocation, or of changing the beneficiary. It is true that he entered into no obligation to continue to pay the premiums; but the omission to do this did not have the effect to give to him an implied power of revocation. His mother might herself continue the payment of the premiums; moreover, by the terms of the policy, after payment of two full annual premiums it would not lapse, and certain valuable rights would still exist under it. Under these circumstances the assured could not legally surrender the policy without his mother's consent, and her rights are not affected by such surrender. This seems to us to be the true rule, and it is supported by the weight of good authority: *Chapin vs. Fellows*, 36 Conn., 132; *Leman vs. Phoenix Life Ins. Co.*, 38 id., 294; *National Life Ins. Co. vs. Haley*, 5 East. Rep'r, 413; 15 Ins. L. J., 334; *Barry vs. Burne*, 71 N. Y., 261; *Landman vs. Knowles*, 22 N. J. Eq., 594; *Manhattan Life Ins. Co. vs. Smith*, Ohio St., 1885, 15 Ins. L. J., 334; *Ricker vs. Charter Oak Life Ins. Co.*, 27 Minn., 193; *Wilburn vs. Wilburn*, 83 Ind., 55; *Weston vs. Richardson*, 47 L. T. (N. S.), 514.

It is urged in behalf of the widow of the assured that the above rule should not be applied to the case of an endowment policy, like the present, where the whole sum covered by the policy was to be paid to the assured himself as soon as the premiums and other payments should amount to that sum. But the assured died before the premiums amounted to that sum, and no other payments were made upon the policy, and, therefore, the amount of the policy did not become payable to him, but by its terms was payable to his mother. The fact that it ought to have become payable to him in a certain contingency, which did not happen, is immaterial. In *Leman vs. Phoenix Life Ins. Co.*, *ubi supra*, the policy was an endowment policy, but this fact was not dwelt upon in the decision, or, so far as appears, in the argument.

It is further suggested that the defendants have incurred liability. But the second policy contains a statement of continuation of the original policy. There is nothing estoppel in favor of the widow. She paid nothing towards the premium and in no way has altered her position in connection with the issue of the second policy. Indeed, it does not appear that she was aware of its existence. Neither the assured nor the defendants intended to create a double liability. They undertook to do what they could not accomplish, namely, to transfer the benefit of the policy from the mother to the wife of the assured. There being no estoppel, the wife gained no rights by reason of what was done.

Judgments affirmed.

SUPREME COURT OF PENNSYLVANIA.

LEBANON MUT. INS. CO. }

vs. }

HUMES AND OTHERS.* }

Where it appeared from the evidence that there was a mutual understanding between the company, its agent and the insured that instead of a strictly cash payment of premium at the time of effecting insurance a short credit would be given, and the policy provided that it should be void if the insured neglected to pay the premium, a failure to pay until the renewal premium was a short time overdue and a loss had occurred, did not work a forfeiture.

ADAM HOY, *for Plaintiff in Error.*

BEAVER & GEPHART, *for Defendants in Error.*

STERRETT, J.

One of the conditions of the policy in suit is, if the assured "shall have neglected to pay the premium, * * * then, and in every such case the policy shall be null and void." The alleged breach of this condition is the only defense interposed by the insurance company. The policy, issued April 24, 1882, for one year from that date, was twice renewed. The first renewal certificate is dated April 4, 1883, to take effect at expiration of original risk; and the second, April 1, 1884, to take effect on the twenty-fourth of that month. In both of these certificates issued by the secretary under seal of the corporation, the payment of \$30, renewal premium by the assured, is acknowledged; but in point of fact the first was paid to the company on June 4, 1883, and the second was remitted to Mr. Tredeick, agent of the company, on May 3, 1884, next day after the fire, and was by him immediately forwarded to plaintiff in error, who refused to receive or recognize it as a payment, for the reason

* Decision rendered, October 4, 1886.

that the property covered by the policy was destroyed before the renewal premium was paid or tendered.

On the trial, evidence was received tending to show that Tredick, through whom the insurance was placed, was the recognized agent of the company for the purpose of securing risks, receiving and remitting premiums, etc.; that in his dealings with the company he was made its personal debtor for premiums on all policies issued through him, and that he periodically accounted to it therefor, whether the money was received by him for the persons to whom the policies were issued or not; that he made the persons or firms to whom he delivered policies his personal debtors, and dealt with them in that relation, charging them with the premiums on his books, sending them bills in his own name, and making himself responsible to the company for the same; and that the bills for premiums were generally rendered some time during the month after the insurance was effected. The admission of this evidence was excepted to, and is the subject of complaint in the first three specifications of error. In submitting the case to the jury on the evidence above mentioned, the learned judge instructed them, in substance, to find for the plaintiffs if they were satisfied as to the truth of the facts alleged by them. These instructions are also assigned for error in the fourth to seventh specifications, inclusive.

In view of the testimony, the instructions under which it was submitted, and the verdict in favor of plaintiffs for the full amount claimed by them, the jury must have found all the controlling facts in their favor. They must have found, among other things, that the relations existing between the company, Tredick, its agent, and the assured, were of such a character that it could not be truthfully said the latter neglected to pay the last renewal premium. To visit upon them the consequences of neglect to pay the premium it should appear they were in default; that the premium was payable on delivery of the renewal certificate, or within a specified time thereafter; and that they had neglected to pay it accordingly. The finding of the jury, however, negatives any such conclusion. They found the established course of dealing between the three parties concerned was that Tredick, the agent, was treated as debtor to the company for premiums on all policies or renewal certificates procured through him, whether he received such premiums from the parties in whose favor they were issued or not, and that he was not expected to account and pay to the company until a statement was rendered during the next succeeding month; that, as between Tredick and

the assured, the latter were not expected to pay in advance, but upon demand made by him a month or more after the insurance was effected. If such was the mutual understanding of the parties (and the jury has impliedly found it was), it would be a mere travesty of justice to hold that they neglected to pay the premium in question, and thus permit the company to shirk the payment of an honest obligation. It cannot be truthfully said the assured neglected to pay a premium, which, according to the mutual understanding of all the parties, was not demandable before it was actually admitted to the party entitled to receive it.

The true answer to the very technical defense interposed in this case is not that there was an actual waiver of the condition in question, but that there was a mutual understanding between the parties that, instead of a strictly cash payment of premiums at the time of effecting insurance, a short credit would be given by the company to its agent and by him to the assured. This fact was so clearly and conclusively shown by the testimony that the jury, under the instructions given them, could not have done otherwise than find for plaintiffs.

It is unnecessary to consider the specifications of error in detail. The plaintiff in error has no just ground of complaint in regard to either of the rulings of the court. The evidence complained of was properly received and submitted to the jury, with instructions which, in the main, are correct. In the light of the testimony, and the facts which the jury must have found, therefore, in reaching the conclusion they did, the defense is destitute of merit, and such as no reputable underwriter should ever insist upon. Judgment affirmed.

SUPREME COURT OF PENNSYLVANIA.

Error to Common Pleas, Lebanon County.

BATDORF, Ex'r,

vs.

FEHLER.*

A, an old woman, was living with her daughter and B, the father of her son-in-law. B had A's life insured; his only interest being, as stated in the application, "has kept her for a certain length of time, and promises to keep her as long as she lives." After the death of A, her executor attempted to recover the amount of the policy from B, less the amounts paid by him. The court, on the trial, refused to charge the jury, as matter of law, that the insurance was speculative. *Held*, not to be error.

Assumpsit by Aaron Batdorf, executor, etc., of Mary Behney, deceased, against John Fehler, to recover certain moneys received by defendant on a policy of insurance on the life of decedent.

Mary Behney, a widow, somewhat advanced in years, broke up housekeeping, and went to stay with her daughter, Mina Fehler, who was married to a son of John Fehler, the defendant. Fehler's son, the only child, lived in the same house,—in the family,—and did the work of the farm. After she had come there, she became ill, and the daughter waited on her. After Mrs. Behney had thus been staying with her daughter about a year, John Fehler, the father-in-law of her daughter, with whom the mother was staying, took out two policies of insurance—one for \$2,000, and one for \$1,000—on her life. Fehler paid the entrance-fees and assessments on the death of members of the classes to which her policies belonged down

* Decision rendered, May 16, 1887.—From *Atlantic Reporter*.

to the time of her death, and after her death drew from the U. B. M. Aid Society \$2,780 on the two policies. The interest he had in her was contained in the answer as to interest in the applications, in the following language: "Has kept her for a certain length of time, and promises to keep her as long as she lives."

Upon the trial, before McPherson, A. L. J., plaintiff requested the court to charge:—

"First. No question of good faith can arise in this case. The taking out of the policies on the life of Mary Behney by John Fehler, who was a stranger to Mary Behney, and without any insurable interest in her life, and the holding of the policies and the payment of the premiums by Fehler to keep them up, made him a speculator in, and the transaction a speculation on, the duration of the life of Mary Behney, and therefore without legal effect, and the verdict of the jury must be in favor of the plaintiff for the amount received by Fehler on the policies, less proper payments and advancements on the security thereof. Answer. That is refused. It asks us to say to you, as a matter of law, that this was a speculative transaction, which we decline to do." Second assignment of error.

"Third. The claim of Fehler, that he held the policies on a contract with Mary Behney to support her during life, and bury her after death, is against the policy of the law, as, if such was the case, the transaction was a speculation or gambling upon the duration of the life of the insured, in which he had no interest. Answer. As a question of law, that is refused. In some cases it might be a speculation. In others it might be a very praiseworthy act. As a question of law, it is refused." Third assignment of error.

Before arguing to the jury, counsel for the plaintiff presented another point, which he stated he had prepared since the adjournment of the court in the morning, as follows: "Fourth. The daughter of Mary Behney, Mina Fehler, the wife of Fehler's son, who was living in the house with Fehler at the time, having as she testified, done and had most of the nursing and care of her mother herself, was not entitled to anything for this without a special contract, and makes no claim therefor, and John Fehler could acquire no claim for such nursing and care; and there being no evidence that he made any claim for this, or for her board prior to the insurance, there was no debt due him giving him an insurable interest in her life." The court declined to receive the point, for the reason that it was not presented at the proper time, and it was not in accordance with the rules of court. After arguing to the jury, and before ver-

dict, counsel for plaintiff requested an exception to this ruling, which was granted. Fourth assignment of error.

Verdict for defendant, and judgment thereon, whereupon plaintiff took this writ.

BASSLER BOYER, for Plaintiff in Error.

The point, having been handed up before the close of the argument, was in time. Act March 24, 1877 (P. L., 38). No question of good faith could arise in this case. If it was anything, it was a question of contract and re-imbursement, and all beyond that was speculative: Siegrist's Adm'r vs. Schmaltz, 113 Pa. St., 326; 6 Atl. Rep., 47.

A. W. EHRGOOD and JOSIAH FUNCK, for Defendant in Error.

Even if the court was bound to receive the point, which we deny, the exception, having been taken just before verdict, was too late: Pacific & Atlantic Tel. Co. vs. Com., 66 Pa. St., 78; Kinley vs. Hill, 4 Watts & S., 426. This was not a speculative risk, but a bona fide transaction.

PER CURIAM.

Without deciding whether we can review the action of the court in declining to receive the point referred to in the first specification, as no exception was taken at the time of its rejection, we are nevertheless of the opinion that the point cannot be affirmed. So the plaintiff sustained no injury. The other points were correctly answered, and the case was accurately submitted to the jury.

Judgment affirmed.

SUPREME COURT OF INDIANA.

Appeal from Superior Court, Marion County.

MASONIC MUT. BEN. SOC.)

vs.)

BURKHART.*)

A beneficiary acquires no vested right to the benefits which are to accrue upon the death of a member of a mutual benefit and charitable association until such death occurs, and the member may exercise the power of appointment without the consent of such beneficiary, and without restriction other than such as may be imposed by organic law, or the rules and regulations of the society.

Where the original beneficiary in such case brings an action upon a changed certificate, and any proper regulation of the society has been violated by such change, he must aver and prove the same.

The general rule is that the right to change a beneficiary in a mutual benefit society, by mutual agreement of the association and the member, exists independently of its constitution and by-laws, and may be exercised whenever it is not limited directly or impliedly by such constitution or by-laws; and the act of March 2, 1877 (Rev. St. Ind. 1881, § 3,850), did not change the rule, except to prevent any future restrictions in the constitution or by-laws of such society upon the contract or the rights of the parties to change the beneficiary.

On demurrer to complaint. Petition for rehearing. For the original opinion, see 10 N. E. Rep., 79. [16 Ins. L. J., 297.]

Rev. St. Ind. 1881, § 3,850, in article 3 of chapter 34, relating to "corporations—lodges and societies," is as follows: "All certificates of membership, policies, or other evidence of interest in any masonic, odd-fellow, or other benevolent or charitable association, society, or incorporation, named in section one of this act [section

* Decision rendered, April 7, 1887.—From *Northwestern Reporter*.

3,848,] shall be regarded as a contract between the person whose life is insured by such certificate of membership, policy, or other evidence of interest, and the association, society, or incorporation of which he is a member; and it shall be lawful for such association, society, or incorporation to change the name or names of the payee or payees, beneficiary or beneficiaries, named in such certificate of membership, policy, or other evidence of interest, on such terms and conditions as the parties to the contract may agree to."

STANTON J. PEELLE, *for Appellant*.

SHEPPARD & MARTINDALE and APPLEWHITE & APPLEWHITE, *for Appellee*.

MITCHELL, J.

In support of the petition for a rehearing, it is contended that the right of a member of a charitable association to change the beneficiary designated in his certificate of membership is derived from the constitution or the rules and regulations of the society of which he is a member, and that, unless the right to change is reserved in the constitution or by-laws of the society, or in the certificate of membership, such right does not exist. Hence it is argued that, because it does not appear in the complaint in this case that such a right was so reserved, Mrs. Burkhart took a vested interest in the certificate of membership, which was not and could not be effected by the act of 1877 referred to in the opinion. Our conclusion then was, and to that conclusion we still adhere, that unless the constitution or by-laws of the society, either expressly or by necessary implication, denied or restricted the privilege of the association and the member to agree upon a change in the name of the beneficiary, such right existed and could not be exercised. The right to change the contract by the mutual agreement of the parties is not derived from the charter and by-laws, but may be either directly or impliedly limited thereby. Unless the power to change is thus limited, the beneficiary named in a certificate of membership has no vested interest in the fund prior to the death of the member. If, at the time the contract of membership involved in the case under consideration was made, the charter or by-laws were such as to prohibit a change in the beneficiary designated in the certificate, then Mrs. Burkhart took a vested interest, and the act of 1877 did not affect her rights, or authorize a change without her consent. If there was no prohibition against a change in the constitution of the association, then the act referred to had no effect upon the transaction one way or the other.

That act declares that certificates of membership in charitable associations shall be regarded as contracts between the members and the association. Such certificates were contracts between the members and the society before, precisely as they were after, the act. The statute was merely declaratory of what the law was in that respect from the beginning. Prior to the statute it was competent, however, for a charitable association, in its constitution and by-laws, to limit or prohibit the right to make changes in the names of beneficiaries after they had once been designated as such. Since the statute went into effect, and became incorporated into the constitutions of such societies, no limitation or restriction repugnant to its terms can be imposed upon the society and its members by any regulation of the association. The effect of the statute was simply to take away the power of such associations, by any regulation, to impose restrictions upon the rights of the parties to the contract, or to prevent them from making any changes in respect to beneficiaries which they might afterwards agree upon. The petition for a rehearing is overruled.

SUPREME COURT OF ALABAMA.

HURST AND OTHERS

VS.

HOME PROTECTION FIRE INS. CO.* }

When a company in accordance with the policy-terms gives notice of election to replace, it is no longer under obligation to pay a money-damage if it performs its undertaking. Such an answer, if true, is sufficient in proceedings for garnishment to discharge the garnishee.

PARKS & SON, *for Appellants.*GARDNER & WILEY, *Contra.*

STONE, C. J.

When an answer in garnishment is full and complete, and leaves nothing for ascertainment by events to transpire afterwards, then, unless the truth of the answer is controverted, or some other issue is formed upon it, the case is one for simple judicial determination. If the answer admits a money-liability due to the defendant in the judgment on which debt or indebtedness *assumpsit* can be maintained, then a money-judgment will be rendered against the garnishee. If the admitted indebtedness has not matured, or if the debt to aid the collection of which the garnishment is sued out, has not been reduced to judgment, then the garnishment suit cannot be made effective until the particular event happens. If the answer discloses that the garnishee has in his possession or under his control personal property or things in action belonging to the defendant, then judgment of condemnation must be rendered that the personal property be delivered up on demand, after rendition of judgment: Code 1876, pt. 3, tit. 1, c. 19, commencing with section 3,218; *id.* pt. 3,

* Decision rendered, January 29, 1887.

tit. 2, c. 1, art. 2, commencing with section 3,269; id., art. 5, commencing with section 3,293; Brick. Dig., 175, § 313, et seq. If the answer denies all indebtedness, and denies the possession or control of personal property belonging to defendant, such as is subject to the process, and there is no issue or contest raised on the answer, the garnishee must be discharged. Cases of obligation to deliver property, to perform labor, and some others, cannot be the subject of garnishment. The statute does not provide for such cases: *Jones vs. Crews*, 64 Ala., 368; *Levisohn vs. Waganer*, 76 Ala., 412.

When the garnishment was served in this case, the facts existed out of which there would arise a duty and liability resting on the insurance company. It had issued a policy insuring the dwelling-house of the defendant in judgment against loss or damage by fire, which policy was in force, and the dwelling had been burned. Proof of loss had not been made, and the quantum of loss or damage had not been adjusted. The policy contained this clause: "In case of any loss on or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged with others of like kind and goodness, and to rebuild or repair the building or buildings (a reasonable deduction being allowed for the increased value of new in replacing old materials) within a reasonable time, giving notice of their intention so to do within thirty days after the preliminary proofs shall have been received at the office of the company." The answer of the garnishee was filed at the spring term of the court, 1886, and is shown to have been sworn to April 15, 1886, and filed in court on the twenty-first day of the same month. It sets forth that the loss was adjusted and settled with the assured March 28, 1886, at \$1,600. The answer contains this further statement: "And this garnishee says that within thirty days after the making and furnishing of the preliminary proofs of loss it claimed the option to rebuild and replace the building so claimed to be destroyed by fire, and thereof gave notice to the said Cotton" (the assured).

The answer of a garnishee must be taken as true unless controverted. Now, the stipulations of the policy were in no stronger sense a promise to pay money than they were to rebuild the house. Doing the one released the company from the performance of the other. The option of doing the one or the other was expressly reserved to the insurance company; and when it elected to rebuild, and gave notice thereof, it no longer rested under an obligation to pay money, unless it violated its promise to rebuild within a reason-

able time. If the election was not in fact made, or not in good faith, with the intention of performing it, this would be ground for contesting the truth of the answer. It may extend further, and would maintain an action on the case for deceit and fraud perpetrated by such simulated election defrauding plaintiffs of their remedy. But, as we have said, we treat the answer as true, not only because the law requires us to treat it, but because we are without evidence on which to reach any other conclusion. Taking the answer as true, there is no conclusion which can be reached by process of garnishment: *Jones vs. Jones* (64 Ala., 368), which collects the authorities; *Drake vs. Drake*, §§ 553, 659. There are decisions which restrict the right to garnish in cases like this to narrower limits than those declared by our law. They were rendered on statutes less liberal than ours. *Davis*, 49 Me., 282; *Godfrey vs. Macomber*, 128 Mass., 282; *vs. Insurance Co.*, 28 Mich., 201; *Gies vs. Bechtner*, 12 N. D. (Gil., 183).

Our statute (Code, § 3,269), requires the garnishee to answer "whether he was indebted to the defendant at the time of the attachment [service of the garnishment], or at the time of making his answer, and whether he will not be indebted to the plaintiff by a contract then existing," and the remedial power of the process are co-extensive with such answer.

The garnishee was discharged on his answer, to which no objection was excepted. It is contended before us that in this case the court erred, and that the garnishee should have been held to answer whether he was indebted to the plaintiff at the time of the attachment, and whether it carried it out by actually rebuilding, and whether it carried it out by actually rebuilding, possibly, if plaintiffs had moved for such order, the court should have granted it. We leave this question undecided. The record fails to inform us that any such motion was made. The court did not err in refusing to grant such order ex mero motu. To put the court in error for non-action, the party complaining must invoke action. The present record furnishes no evidence that plaintiffs desired delay or further answer. Affirmed.

SUPREME COURT OF PENNSYLVANIA.

Error to Common Pleas, Crawford County.

McARTHUR, ADM'R,

vs.

CHASE AND WIFE.*

Where one has an insurable interest in the life of a person, the amount or extent of which is not questioned upon the trial of the case, it is too late to raise such questions in the supreme court.

Feigned issue, wherein Charles N. Chase and Mary L. Chase are plaintiffs, and E. W. McArthur, administrator of the Estate of S. F. L. Blair, deceased, is defendant to determine who was entitled to the sum of \$2,000, insurance upon the life of decedent.

Samuel F. L. Blair, in his lifetime, became a member of a lodge of the Ancient Order of the United Workman of Pennsylvania. As such member there had been issued to him by the grand lodge of said order of Pennsylvania a certificate of membership, styled a beneficiary certificate, in which the said grand lodge agreed to pay to the person or persons therein named, as beneficiary, upon the death of said Blair, he having complied with all the rules and regulations of the order, the sum of \$2,000. Samuel F. L. Blair died November 1, 1884, leaving to survive him a divorced wife and three minor children. A few months prior to his death, he went to board with Charles N. Chase and Mary L. Chase, his board being provided for and paid by Jefferson Lodge No. 1, A. O. U. W., at the rate of three dollars per week. After he had remained with the Chases

* Decision rendered, February 14, 1887.—From *Atlantic Reporter*.

three weeks, Blair was induced to surrender his beneficiary certificate, and make application to the grand lodge for the issuance of a new certificate of membership, wherein the said Charles N. and Mary L. Chase should be named as beneficiaries. This application was duly made through Jefferson Lodge No. 1, being the subordinate lodge with which Blair was connected, and such a certificate was delivered about July 29, 1884. This arrangement was brought about by the Chases and Jefferson Lodge No. 1, A. O. U. W., which lodge had been the beneficiary named in the surrendered certificate, and had been relieving said Blair for some time prior thereto and at that time was paying for his board at the Chases'.

By the arrangement then entered into, Chase and wife agreed that they would, at all times and whenever called upon, pay all the lodge dues, assessments, relief calls, etc., of said Blair to said A. O. U. W.; furnish and provide said Blair, during his natural life, with necessary, suitable, and comfortable food, board, maintenance; and clothing, in sickness and in health, provide physician's care and medicines, nursing, etc., and, in case of death, furnish and provide a respectable and suitable burial, and procure and erect a suitable tombstone at his grave; and to give security for the faithful performance of their undertaking by executing a mortgage on the farm belonging to Mary L. Chase, in the sum of \$2,000, to the trustees of Jefferson Lodge. In consideration for such board, care, and maintenance, payment of lodge dues and assessments, etc., by the Chases, the beneficiary certificate then held by said Blair in the A. O. U. W. was to be surrendered, and application made to the grand lodge for a new certificate to be issued to him, wherein the said Charles N. Chase and Mary L. Chase should be named as beneficiaries. In pursuance of such arrangement, the execution of the mortgage therein provided for, and the change in the beneficiary certificate as contemplated, were consummated.

Charles N. Chase and Mary L. Chase were in no way related to S. F. L. Blair, nor were they, or either of them, creditors of Blair at the time said beneficiary certificate in which they were named as beneficiaries was issued. Up to that time his board had been paid in full by Jefferson Lodge. From that time up to the time of his death, on November 1, 1884, covering a period of between three and four months, Blair remained with the Chases, who complied with their contract so far as it related to support and maintenance and payment of lodge dues and assessments.

After Blair's death, E. W. McArthur was appointed administrator of his estate, and he entered suit against the grand lodge of the A. O. U. W. of Pennsylvania to recover for the estate the amount of the beneficiary certificate, and the Chases brought suit against the same defendant for the same money. The grand lodge presented its petition to the court below, setting forth that the plaintiffs in each one of said causes claim to recover the sum of \$2,000 on a beneficiary certificate issued by defendant on the life of S. F. L. Blair, and which certificate is No. 20,998; that said defendant disclaims all interest in the subject-matter of the cause; that they are truly indebted on said beneficiary certificate to whomsoever is lawfully entitled to receive the proceeds thereof, and are willing and ready to pay the same over accordingly; and prayed the court to frame an issue between the plaintiffs in said suits for the determination of their respective rights; and thereupon the issue in this case was formed, to determine whether the said Charles N. and Mary L. Chase, or the said administrator of S. F. L. Blair, deceased, were entitled to the said sum of \$2,000, in the hands of the Grand Lodge of the A. O. U. W., of Pennsylvania. In such issue Charles N. Chase and Mary L. Chase were made plaintiffs, and E. W. McArthur, administrator of S. F. L. Blair, defendant. Verdict and judgment for plaintiffs, whereupon defendant took this writ.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF MISSOURI.

MISSELHORN

vs.

MUTUAL RESERVE FUND LIFE ASS'N.*

Where an application for life insurance, and the policy issued thereon, both provided that the policy should not be in force until "signed by the officers of the association, and delivered to the applicant," and the policy was made out after the applicant's death, and, in ignorance thereof, delivered at the place where he had resided, *held*, that it was void.

In such cases unreasonable delay in acting upon the action does not operate to bind the company to whom the application is made, as insurer.

In Equity. Demurrer to bill.

GEORGE W. TAUSSIG, *for Plaintiff.*

WM. C. & JAMES C. JONES, *for Defendant.*

BREWER, J. (orally).

This is a suit on a policy of insurance. The application and the policy each contained this stipulation, "that this policy is not to be in force until it has been signed by the officers of the association and delivered to the applicant." The application was made in November, and the examination before the physician had on December 4th. Through some delay, the application did not reach New York City until December 18th. It was examined and approved December 21st, and on December 22d the policy was prepared and sent to St. Louis, reaching here on the 25th, and then, by messenger, it was sent to the place where the applicant had resided. On the 21st, the very day the application was acted upon in New York City, the ap-

* Decision rendered, April 5, 1887.—From *Federal Reporter*.

plicant died suddenly; so that at the time the policy was prepared, and long before it was received in this city or delivered, the applicant for insurance was dead. By the terms of both the application and the policy, it never became an operative contract. The case comes within the rule laid down in a suit decided by me last fall against this same insurance company : *Kohen vs. Life Ass'n*, 28 Fed. Rep., 705.

The plaintiff, however, insists that there was delay—culpable delay—on the part of the insurance company in acting upon the application. The application and examination were completed, as I stated, on December 4th. For some reason the application did not reach New York City until December 18th. Concede that there was unreasonable delay, and yet I do not see how any delay makes a contract in the face of the stipulation. If the applicant was dissatisfied, and the delay unreasonable, he could have recovered the money which he had paid.

While receipt of the application may cast a moral duty upon the company to act promptly, yet delay does not operate in the same way as an acceptance of the application. Suppose the company had delayed acting for a year, could it be claimed that the policy was in force? The proposition which the applicant made was for a policy to become operative when the instrument was executed and delivered. No negligence, no delay, reasonable or unreasonable, on the part of the insurance company, could make a contract in face of the stipulation. The decree will be entered for the defendant.

UNITED STATES CIRCUIT COURT.

NORTHERN DISTRICT OF ILLINOIS.

LAMONT

vs.

HOTEL MEN'S MUT. BEN. ASS'N.*

Where the articles of association and by-laws of a benevolent society provide that the benefit is payable to the person designated by the member in his application or by will, a member may at any time change the designation of the beneficiary with the consent of the society regardless of insurable interest.

W. C. ASAY and CHARLES OGDEN, for Lamont.

JOHN BALDWIN, and BATES, BROUGHMAN & TUTTLE, for Graft.

BLODGETT, J.

This is a suit in equity to recover the sum of \$2,000 upon a benefit certificate issued by the defendant to one John P. Hulett. The defendant company is a corporation organized and existing under an act of the State of Illinois entitled "An act concerning corporations," approved April 18, 1872, and by one of the articles of the association it is provided as follows:—

"Upon positive proof of the death of any member, the board of directors shall order an appropriation equal to two dollars for each member then on the rolls of the association, unless the same shall exceed 1,000 members, in which case the amount appropriated shall be limited to the sum of \$2,000, and shall pay the same to the person or persons previously designated by the deceased upon his ap-

*Decision rendered, May 16, 1887.

plication for membership as shown by the books of the association, or as ordered by his last will and testament."

The proof shows that Hulett became a member of this association on February 3, 1883, and up to the time of his death, which occurred August 11, 1885, he remained a member in good standing. In his application for membership he designated his daughter, Mary A. Lamont, as his beneficiary. On the sixteenth day of August, 1884, he designated Emily R. Graft as his beneficiary in the place of Mary A. Lamont; and this change was accepted and approved by the board of directors of the association, and from that time forward the name of Emily R. Graft as the beneficiary of this member was carried on the books of the association. The complainant insists that the change was void and inoperative; that she acquired a vested right to the benefit by virtue of Hulett's original benefit certificate; and that the assignment and transfer of the benefit to Mrs. Graft was wholly inoperative and void.

Without taking time to discuss the large number of cases cited by each party in this case, it is sufficient to say that there is probably a conflict of authorities upon the question of transferring this class of benefits in voluntary benevolent associations; but inasmuch as, under the articles of association and by-laws of this defendant, the benefits are payable to the person designated by the member in his application for membership, or by his last will and testament, it seems very clear to me that it was competent for Hulett, by his own act, at any time before his death, without the formality of a will, to make a transfer of this benefit from the original beneficiary named to any other person he might select, without regard to whether the person had or had not an insurable interest in his life; and in this case, the transfer, having been made by Hulett before his death, and accepted by the company, and carried upon their books from that time forward, it seems to me the transfer became operative, and the court must therefore enforce it. As Mrs. Lamont, the first beneficiary named, paid nothing, I do not see how she can be said to have acquired any vested interest in the benefit fund pertaining to Hulett's membership which would prevent Hulett, at any time before his death, from changing the beneficiary with the consent of the defendant. A decree will therefore be entered dismissing the complainant's bill for want of equity, and directing the payment by the principal defendant of the benefit fund to Emily R. Graft.

UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF NEW YORK.

SEMM

vs.

SUPREME LODGE KNIGHTS OF HONOR.*

Where the absolute truth of an answer in the application is not warranted, the answer must be according to reasonable belief and not misrepresent or suppress known facts.

CHARLES STECKLER, *for Plaintiff.*

MORRIS GOODHART, *for Defendant.*

SH

The question of law is whether, under Semm's application to the Humboldt Lodge for membership therein, and the certificate he received from said lodge, he warranted the truth of the answers which he gave to the question, "Have you been rejected by a medical examiner of any lodge or society?" In my opinion, no answer was required, under the contract, to answer the question according to his knowledge or reasonable means of belief, and not to represent or suppress known facts, but that he did not warrant the absolute truth of his answers. The reason of the objection contained in the applicant's agreement in his printed application for membership.

As stated when the motion for a new trial was made, I overruled the objection to the verdict on the ground that it is against the weight of the evidence. The motion for a new trial is denied.

* Decision rendered, February 14, 1887.

LOWER COURT DECISION.

EFFECT OF NEW PARTNER.

Supreme Court of Cincinnati, O., General Term.—Error to Special Term.

HENRY BLACKWELL

vs.

THE MIAMI VALLEY INS. CO.*

The policy provided that if the assured sell or transfer the property it should be void. The insured subsequently transferred to a firm consisting of himself and a partner.

Held, That the insured did not part with his insurable interest by the transfer so as to avoid the policy irrespective of conditions in that instrument, but there had been a sale which worked a forfeiture within the provision.

JORDAN & JORDAN and JOS. G. O'HARA, *for Plaintiff.*

RAMSEY, MAXWELL & MATTHEW, and SYLVESTER G. WILLIAMS, *for Defendant.*

TAFT, J.

This was an action on a renewal of a policy of insurance issued by defendant to plaintiff on stock of dry-goods in the city of Cincinnati.

The third defense set up the following condition of the policy; "If the assured shall sell or transfer the property herein insured, * * this policy shall be null and void," and that, after the last renewal, plaintiff sold and transferred the insured property and the business to the firm of Blackwell and Horman, consisting of

* Decision rendered, May, 1887.

himself and one Horman, and that thereafter until the time of the loss the property was owned and the business was carried on by Blackwell & Horman as partners, and that Blackwell was not the owner of the property at the time of the fire. A demurrer to this defense was overruled, and the plaintiff declining to plead further, judgment was given for the defendant. The case comes before this court on a petition in error.

Counsel for defendant in error urge the sufficiency of the defense upon two grounds. They claim, first, that even if there were no express restriction upon alienation, the transfer by Blackwell to the firm avoided the contract of insurance, because by such transfer Blackwell, as an individual, lost all his insurable interest in the property; that thereafter he had no interest save in the profits of the partnership and the surplus of the proceeds of the stock after the debts of the partnership had been paid, and that as it does not appear that there would have been any proceeds left after payment of the debts there is no interest shown which entitles him to recover on the policy.

We do not think this ground a good one. The interest of a partner in the assets of the firm is an insurable interest. In the partnership account he is entitled to a credit of his proportionate share of the assets. If any of the assets are lost, its results in a pecuniary loss to him. This is the case whether the assets exceed the debts or not. If they do not, then the loss increases the liability of each partner to the creditors of the firm. To the extent of the proportionate increase of his liability by reason of a burning of the stock each partner has an insurable interest.

The Supreme Court of Massachusetts held in the case of *Converse vs. Citizens' Mutual Insurance Co.* (10 Cushing, 37), that a partner may have an insurable interest in a building purchased with partnership funds, although it stands upon land owned by the other partner. Chief Justice Shaw is summing up on this point says:—

“We are of opinion, therefore, that upon a settlement of the joint account, this building must have been treated as joint property, for his share of which the son would have been entitled to credit on the partnership account. He, therefore, had such an equitable interest in the building before any account settled, that though it stood on the land of his father, he must sustain a pecuniary loss by its destruction by fire.”

In *Gordon vs. Mass. F. & M. Ins. Co.* (2 Pick., 249) a vessel was insured on the 1st of June for “whom it may concern.” She

was then owned by the plaintiff who on the 1st of July made an absolute bill of sale of her, taking a memorandum from the assignee wherein he promised to appropriate the proceeds of the vessel to himself as security for indorsing for the plaintiff. Afterwards a loss happened. It was held that notwithstanding the transfer there was at the time of the loss, a subsisting interest which was protected by the policy; since the debts, on account of which the transfer was made, would still exist, except so far as they should be discharged by the proceeds of the property assigned.

The same principle is laid down in Phillips on Insurance, Sec. 208.

The difficulty of determining the exact extent of plaintiff's loss by the burning of the goods because it might involve an investigation of the partnership account, which is urged by counsel, cannot affect a substantial right of plaintiff to recover if there is no other objection. Whether his interest is legal or equitable it is insurable.

The second ground urged by defendant is that the transfer from Blackwell to Blackwell & Hormon was a sale or transfer in violation of the condition of the policy.

The authorities are in conflict as to just what kind of a transfer avoids a policy under such a condition.

Where given words of a contract may have a liberal or a narrow sense, other things being equal, that meaning is generally adopted which is most beneficial to the promisee; and courts have very generally narrowed as much as possible, without doing violence to the language used, the effect of conditions and clauses of forfeiture in limitation of the principal obligation. But where the condition or proviso has seemed to have a reasonable basis, to be consistent with the nature of the contract of insurance and to find its origin in a proper motive on the part of the company, the courts generally have not hesitated to give that construction which will carry out the reasonable purpose of the condition.

The nature of the contract in view of conditions as to alienation is well stated by the court in *Burnett vs. Eufaula Home Ins. Co.* (46 Ala., 14), where, in commenting on certain decisions on the subject, it says: "The principal sustaining these adjudications is that there is a purely personal contract by which the insurer undertakes a conditional indemnity of the insured alone, dependent upon certain duties to be performed by him into which enter his personal character and fitness. The property does not draw with it the contract because its probable destruction is the foundation of the agreement.

The essence of the contract is taken away by the transfer of the proprietary interest to persons not parties to it."

It has been held in a number of cases that it was a violation of a clause against alienation or sale that one partner of an insured firm had sold his interest to another of the firm. The argument was that the insurance company relied on the firm as constituted when the policy was issued for the performance of the conditions of the policy and that it did not appear but that the person whose interest had been sold was the person whose membership in the firm was the motive for trusting it: *Hartford Fire Ins. Co. vs. Ross*, 23 Ind., 179; *Western Mass. Ins. Co. vs. Richer*, 10 Mich., 279.

Later decisions, however, have been more liberal to the assured in the construction of such conditions. The leading case is *Hoffman & Place vs. Aetna Ins. Co.* (32 N. Y., 405), in which it was held that the retiring of one member from the partnership by sale of his interest to the remaining members was not within the clause avoiding the policy "if the insured property should be sold or conveyed." The court says: "They, the insurance company, testified their confidence in each of the assured by issuing to them a policy, but did not choose to repose blind confidence in others who might succeed to the ownership. It is suggested that the proviso might have been designed to secure the continuance in the firm of the only member in whom the insurers reposed confidence. The only evidence of their confidence in either is the fact that they contracted with all; and the theory is rather fanciful than sound that they may have intended to conclude a bargain with rogues on the faith of a proviso that an honest man should be kept in the firm to watch them. * * *

It was intended by the proviso to protect the company from a continuing obligation to the assured, if the title and beneficial interest should pass to others, they might not be equally willing to trust." * *

"The design of the provision was not to interdict all sales, but only sales of proprietary interests by parties insured to parties not insured."

This language of the New York Court of Appeals has been adopted and approved by our supreme court in *West vs. Citizens Ins. Co.* (27 O. S., 1), which was a case very like the New York case. It is true that neither of these cases is the one at bar, but the distinction made by which these cases were decided makes them authority on the facts here presented. Judge Johnson says in the *West* case: "the chief reason for requiring such a stipulation is to guard against the introduction of a stranger who may not possess the fidelity or

watchfulness required by the insurers." The change should increase the hazard, and then proceeds to hold the conveyance in that case to be not within the stipulation because it did not introduce a stranger and so did not increase the hazard.

It follows that when a stranger is introduced, the policy under such a stipulation is void. In the case at bar, when Blackwell sold to Blackwell & Horman, he transferred out of himself his sole proprietary interest to a separate and distinct entity, the partnership. The company did not agree to insure or trust the partnership. They did not agree to insure goods in which any other than Blackwell had a proprietary interest. Horman by the conveyance became an owner *per my et per tout* of the stock insured. He became a principal owner with as much control as Blackwell. The conveyance necessarily introduced Horman into that position in which the company required fidelity and watchfulness. Horman was a stranger to the company. He was introduced into the position without the company's knowledge or consent. That fact, the absence of which in the West case took the conveyance out of the stipulation, is present in the case at bar. We can see no escape from the conclusion that Blackwell's sale to the partnership was such a sale or transfer as avoided the policy.

The distinction made in *Hoffman vs. Aetna Ins. Co.*, *supra*, and in *West vs. Ins. Co.* is also found in *Pierce vs. Ins. Co.* (50 N. H. 297), *Dernani vs. Ins. Co.* (26 La. Ann., 69), and in *Burnett vs. Ins.* (46 Ala.). It is true that in all these cases the distinction made saved the insured from a forfeiture of the policy; but it would be disrespectful both to the supreme court of our own State and to the other eminent tribunals making it to suppose that the distinction is not to apply as well in behalf of the insurer as the insured.

Now as to cases whose facts present the exact question at bar. The Supreme Court of Iowa in the case of *Cowan vs. Ins. Co.* (40 Iowa 551) decided that a conveyance by the insured to a partnership of which he was a member was not a violation of a clause that "in case of any transfer or change of title in the property insured, the insurance shall be void." But that case nowhere notices the distinction made in the cases cited as to the introduction of a stranger. Judge Drummond, in *Scanlon vs. Union Insurance Co.* (4 Bissell, 511), presenting the same facts, took the same view but without the citation of authority. In the case of *Malley vs. Ins. Co.* (51 Conn., 222), a case just like the Iowa case, the Supreme Court of Connecticut expressly declined to follow the Iowa court; and Justice

Miller of the Supreme Court of the United States on the circuit in the case of Drennan et al vs. London Assurance Co. (20 Fed. Rep., 657), presenting precisely this question, in most vigorous language supports the view we take of the case at bar. In this state of the authorities in cases on all fours with the one before us we have no hesitation in following those which use the reasoning adopted by our supreme court, although applied in a case where the facts rendered it necessary to sustain the policy.

The judgment of the special term will be affirmed.

Peck and Moore, JJ., concur.

NOTE.—The case of Drennan vs. London Assurance Company, cited above, was reversed in the United States Supreme Court, (113 U. S., 51) ; but upon the express ground that from the nature of the agreement between the parties in interest, in reference to the formation of a partnership, it appeared that a partnership was in fact not contemplated and none was ever established. The supreme court limited its consideration to the question whether or not there was a new partner introduced, and having determined that there was not, but that the negotiations to that end were only preliminary, and had not been consummated when the loss occurred, the judgment of the court below was reversed without going into any consideration of the effect which such a change would have had upon the validity of the policy had it been consummated. The opinion of Justice Miller, therefore, upon the question at bar remains unaffected.

S. G. W.

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REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF INDIANA.

GRAY

vs.

NATIONAL BEN. ASS'N.*

A benevolent society answered in defense that its by-laws, which were known to the applicant, prohibited the insurance of persons under the age of eighteen years and that the applicant fraudulently misrepresented his age as eighteen. To this it was replied that his age was truly stated to the agent as seventeen years and ten months and the latter informed him that two months would make no difference.

Held, That the reply was good on demurrer.

Held, That a copy of the by-laws should be got out in the answer.

* Decision rendered, April 22, 1887.

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Held, That where the proofs of death showed the discrepancy, and the society failed for eighteen months to offer to rescind the contract or return the premiums, until suit was brought, it will be estopped from setting up the discrepancy in defense.

HILL & LAMB, for Appellant.

SHEPARD & MARTINDALE, for Appellee.

Howk, J.

This is an appeal by Bridget Gray, the plaintiff below, from a judgment of the Marion superior court in general term against her for appellee's costs. By a proper assignment of error here, she has brought before this court the same error she assigned below in general term, namely: That the Marion superior court at special term erred in sustaining appellee's demurrer to appellant's amended reply therein.

The case is before us on the pleadings. In her complaint appellant alleged that appellee, the National Benefit Association of Indianapolis, was a corporation organized under the laws of this State, and was engaged in the business of insuring the lives of persons against death, caused by bodily injuries effected through external, violent, and accidental means, when death shall result therefrom within six months from the happening of such accident, and during the time such person shall be a member of such association; that is pursuance of and in accordance with the business of such appellee, on or about the twenty-seventh day of March, 1882, the appellee issued to one William E. Gray a certain policy or certificate of insurance in such association, and took William E. Gray into the association as a member thereof, a copy of which certificate of membership or policy was filed with and made part of such complaint; that while William E. Gray was a member of such association, to wit, on the first day of December, 1882, he (William E. Gray) was employed as a locomotive fireman on a locomotive engine on the Kentucky Central Railroad; that, while so employed, the locomotive whereon he (William E. Gray) was so employed, collided with another locomotive and train of cars on such railroad, and in such collision and by reason thereof, he was thrown violently against the boiler of the locomotive engine whereon he was fireman, and pressed against the same by the tank thereof, and was thereby instantly killed by external, violent, and accidental means; that on or about the —— day of ——, 1883, and within six months after the accident which caused the death of William E. Gray, appellant furnished the appellee with notice and proper and sufficient proofs of the death of William E. Gray, in accordance with the requirements of such certif

icate or policy, and in all respects had done and performed all the conditions and stipulations of such contract on her part, but that the appellee had and still refused to pay such sum of \$1,000 in such certificate or policy mentioned, or any part thereof. Wherefore, etc.

To appellant's complaint the appellee answered in two paragraphs, whereof the first was a general denial. In the second paragraph of its answer the appellee said that its rules and by-laws forbade the issuance of a certificate of membership to any person under the age of eighteen years, or over the age of sixty-five years; and appellant's decedent, well knowing this rule of such association, falsely and fraudulently misrepresented his age to appellee in his application for membership, and warranted to appellee that he was eighteen years of age, whereas he well knew, at the time, that he was under the age of eighteen years; that the appellee never knew that such decedent was under eighteen years of age until appellant presented to it the proofs of his death, wherein she made oath that he was under the age of eighteen years. Wherefore the appellee said that such certificate of membership was void, and the appellant ought not to have and maintain her action thereon.

For her amended reply to the second paragraph of appellee's answer the appellant said that the contract sued on was made and executed between appellee and appellant's son, William E. Gray, at the city of Covington, in the State of Kentucky; that one George Jobe was the appellee's agent, and acted on its behalf in making such contract, and prepared the application of William E. Gray for such certificate of membership; that William E. Gray fully explained to such agent, before the contract was made, and before his application for such certificate of membership was prepared, that, at the time the application was made and such certificate issued, he was under the age of eighteen years, and correctly informed such agent what his true age was, which appellant said was, to wit, seventeen years and ten months; that such agent then informed William E. Gray that the fact that he was under the age of eighteen years by so short a time as two months would make no difference, and that, under the circumstances, when so explained to such agent, it would be proper for him to sign the application which the agent prepared, showing his age to be eighteen years; that thereupon William E. Gray signed such application accordingly, and paid such agent, for the appellee, the sum of \$11.20 as admission fee, and for two advance assessments, which the appellee still retained; that ap-

pellee was not at all deceived thereby, but, through its agent, had full knowledge of the true state of facts in regard to the age of William E. Gray before the issuing of the certificate of membership sued on herein. Wherefore, etc.

We are of opinion that the court below at special term erred in sustaining appellee's demurrer to appellant's amended reply to the second paragraph of appellee's answer herein, and that, because of this error, the general term also erred in affirming the judgment below at special term. It will be observed that, in the second paragraph of its answer herein, appellee has not alleged that there was any provision in the law of its incorporation or charter which forbade its issuance of such a certificate of membership therein as the one sued on in this action, to any person under or over any specified age. It may be safely assumed, in the absence of any averment to the contrary, that appellee was incorporated under and pursuant to the provisions of an act entitled "An act for the incorporation of insurance companies, defining their powers and prescribing their duties," approved June 17, 1852, and in force since May 6, 1853 (1 Rev. St., 1876, p. 584, et seq.). In section 20 of this act (section 3,727, Rev. St. 1881) the general power is conferred upon corporations such as the appellee, to "make insurances * * * on the life or health of any person," without limitation of any kind as to the age of such person in that or any other section of the general law of the State under which they are created, and to which they owe their existence. Of course, if the statute of this State, which constitutes appellee's charter, had conferred upon it the power only to make insurance on the life or health of any person between certain ages, or had forbidden appellee to make insurance on the life or health of any person under or over specified ages, it would not have been competent for appellee, either by its principal officers or by any agent, to have made valid insurance on the life or health of any person, in violation of the limitation as to the age of such person, in the law of its existence: *Leonard vs. American Ins. Co.*, 97 Ind., 299, and authorities there cited; *Presbyterian etc. Fund vs. Allen*, 106 Ind., 593, 7 N. E. Rep., 317.

In the second paragraph of its answer, as we have seen, the appellee averred that its rules and by-laws forbade the issuance of a certificate of membership to any person under the age of eighteen years, or over the age of sixty-five years; and appellee's defense to this suit, as stated in such paragraph, is predicated upon the prohibition in its rules and by-laws against the issuance of the certificate

to William E. Gray, who, as alleged, well knew that he was under the age of eighteen years. It was also alleged that William E. Gray, well knowing appellee's rule and by-law, falsely and fraudulently misrepresented his age in his application for membership, and warranted to appellee that he was eighteen years of age. We are of opinion that the facts stated in appellant's amended reply were amply sufficient, if true, and, as they were well pleaded, their truth is admitted by the demurrer thereto. To avoid appellee's defense to this suit, as stated in the second paragraph of its answer, appellant averred and appellee admitted that the contract in suit was executed between appellee and appellant's son, William E. Gray, at the city of Covington, in the State of Kentucky; that George Jobe was appellee's agent, and acted for it in making such contract, and prepared William E. Gray's application for such certificate of membership; that he (Gray) fully explained to such agent, before the contract was made, and before his application for such certificate was so prepared, that he was then under the age of eighteen years, and correctly informed such agent what his true age was, which appellant said was seventeen years and ten months; that such agent then informed him (Gray) that the fact of his being then under eighteen years of age by so short a time as two months would make no difference; and that, under the circumstances, it would be proper for him to sign the application prepared by such agent, which he (Gray) accordingly signed, and paid such agent for appellee the sum of \$11.20 as an admission fee and for two advance assessments, which appellee still retained; and that appellee was not deceived, but through such agent had full knowledge of the true age of William E. Gray before the issuance of the certificate of membership sued on herein.

It is very clear, we think, that the court below erred in sustaining appellee's demurrer to appellant's amended reply. The demurrer searched the record; and, as the paragraph of the answer to which such amended reply was pleaded was clearly insufficient, the court ought to have overruled the demurrer as to such reply, and to have carried the same back, and sustained it to the second paragraph of appellee's answer. This is so, under the well-recognized rule of practice that even a bad reply to a bad paragraph of the answer is sufficient to withstand a demurrer thereto for the want of facts: *Ætna Ins. Co. vs. Baker*, 71 Ind., 102; *State vs. Porter*, 89 Ind., 260; *Clawson vs. Chicago etc. Ry. Co.*, 95 Ind., 152.

We have said that the second paragraph of appellee's answer was clearly insufficient. The defense attempted to be stated in such paragraph was that appellee was prohibited from issuing a certificate of membership to any person under the age of eighteen years; and that, with knowledge of such prohibition and of the fact that he was under eighteen years of age, William E. Gray made his application for and procured from appellee the issuance of the certificate of membership sued on in this action. The appellee was not prohibited, as we have seen, by any provision of the law under which it was incorporated, or of any other statute of this State, from insuring the life of William E. Gray, nor from executing the certificate or contract sued on for the benefit of his mother, the appellant herein, by reason or on account of the fact that, at the date of his application and of such certificate of contract, William E. Gray was under or over any specified age. The "rules and by-laws" upon which appellee's defense to this suit, as stated in the second paragraph of its answer, is founded, were laws of its own making, for its own government, and apparently for the purpose of imposing restrictions on its own acts, or powers to act, which were not imposed on appellee by any provision of the act under which it was incorporated, or by any other statutory provision in force in this State.

Conceding, without deciding, that it was not competent for appellee, or any of its officers or agents, to waive or suspend the operation of its "rules and by-laws," or to execute and issue a valid certificate of membership or contract in any case where the issuance thereof is prohibited by such "rules and by-laws," we are of opinion that the second paragraph of appellee's answer was and is fatally defective, in this: that it fails to give or set out therein the "rules and by-laws" upon which its special defense to this suit was and is predicated, but gives merely in lieu thereof the pleader's conclusion as to the effect of such rules and by-laws upon the issuance of the certificate or contract sued on. The rules and by-laws upon which appellee relied in the second paragraph of its answer ought to have been set out therein, so that the court might determine whether or not they forbade the issuance of the certificate or contract upon which the appellant sued herein. The second paragraph of the answer was clearly bad, and the demurrer to the reply ought to have been carried back by the court, and sustained to such paragraph of answer.

It is shown by the record of this cause that William E. Gray applied to appellee's agent, at Covington, Kentucky, for the certificate

or contract in suit, on the twenty-fourth day of March, 1882, and that on the twenty-seventh day of March, 1882, such certificate or contract was issued to him by appellee, and was payable to Bridget Gray, the appellant here, in ninety days after the receipt of satisfactory proofs of the death of William E. Gray, etc. It is further shown that on the first day of December, 1882, and while the certificate or contract sued on was still in full force, William E. Gray was instantly killed in a railroad collision, by external, violent, and accidental means; and that on the ——— day of ———, 1883, and within six months after such death of William E. Gray, appellant furnished appellee with satisfactory proofs of such death. This suit was commenced by appellant against appellee, in the court below, for the recovery of the amount due on such certificate or contract, on the twenty-sixth day of October, 1883; and on February 20, 1884, appellee filed its answer herein, the substance of which we have heretofore given. On the eighth day of December, 1884, appellant filed her amended reply, heretofore given in this opinion, and on the same day appellee's demurrer was sustained to such reply. We have said that the facts stated in appellant's reply, which are admitted to be true as the case is now presented, were abundantly sufficient to avoid appellee's defense to this suit as stated in the second paragraph of its answer. Appellee admits by its demurrer that it had full knowledge of the true age of William E. Gray before it issued to him the certificate of membership or contract upon which appellant has sued in this action, and that, with this knowledge, appellee still retained on the eighth day of December, 1884, the sum of money paid by William E. Gray for such certificate, and for assessments against him as one of its members. In the face of these admissions in regard to its knowledge of the true age of William E. Gray before appellee issued to him the certificate or contract sued on herein, its defense to this suit, predicated upon its rules and by-laws, and upon the representation and warranty of William E. Gray in his application for such certificate, is entirely avoided. If it were true, as stated in its answer, that appellee never knew that William E. Gray was under the age of eighteen years until appellant furnished it with proofs of his death, yet as the record shows that such proofs of death were so furnished more than eighteen months before this suit was finally determined in the court below, and as it does not appear that appellee had ever offered to rescind or cancel the certificate or contract sued on, or to refund the money it had received thereon, it must be held, we think, that such certificate or

contract had been so ratified and confirmed by appellee as to estop it from asserting the defense to this suit attempted to be stated in the second paragraph of its answer.

The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule the demurrer to the reply, and to carry it back, and sustain it to the second paragraph of the answer, and for further proceedings in accordance with this opinion.

SUPREME COURT OF INDIANA.

Appealed from the Grant C. C.

SARAH HAVENS

vs.

HOME INS. CO.*

The policy provided that it should be void in case of other insurance without consent indorsed, and that nothing less than a specific agreement clearly expressed and indorsed on the policy should be a waiver of its printed conditions.

Held, That an agreement with the authorized agent at the time of insuring that other existing insurance should be permitted, will estop the company from alleging that such consent was not actually indorsed. But a mere agreement subsequent to the issue of the policy that other insurance might be taken out, where it does not appear that the company had any knowledge that it was taken out, and no request for its indorsement is made, will not operate as an estoppel.

Where the policy is on the building and contents, the amounts on each being apportioned, it is an entire contract, and if avoided as to the building by other insurance thereon without consent, it is also void as to the contents.

McDOWELL, BROWNLEE & HENRY, *for Appellant.*

HARRISON MILLER & ELAM, *for Appellee.*

MITCHELL, J.

This action was brought by Sarah Havens upon a policy of fire insurance issued to her by the Home Insurance Company of New York, on the second day of December, 1883. The insurance was for the period of one year, against loss or damage by fire to the amount of \$2,000, as follows : \$1,500 upon the hotel buildings of the assured in Marion, Indiana, and \$500 on her furniture and house-

* Opinion filed, May 24, 1887.

hold goods therein. Among other stipulations, the policy contained the following: "If the assured shall have, or shall hereafter make, any other insurance on the property insured, or any part thereof, without the consent of the company hereon written, this policy shall be void." There was also the following stipulation in the policy: "The use of general terms, or anything less than a distinct, specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein."

The first paragraph of the complaint alleged the execution of the policy, and that the property thereby insured had been destroyed by fire on the 13th day of November, 1874, and that due proof of loss had been made. This paragraph contains the following averment: The plaintiff further avers that it was expressly agreed and understood that said plaintiff was to have permission to take out an additional insurance of one thousand dollars on said building in any other company, and at any time she desired, and said company agreed to insert said condition in said policy, which it wholly failed to do. And plaintiff says that, relying upon said promise and in pursuance of said contract and agreement, she had effected an insurance on said building in the sum of one thousand dollars, in the Phenix Insurance Company of Brooklyn, New York, as permitted by the express agreement aforesaid." The court below sustained a demurrer to this paragraph of the complaint. The appellant's claim is that the averments above set out in effect show that the insurance company agreed or consented that the assured might procure other insurance on the building, and that having so consented, it is now estopped to assert that there has been a breach of the condition because the consent of the company was not indorsed on the policy. It is said the agreement amounted to a waiver of the condition requiring that the consent of the company to other insurance should be so indorsed. Insurance policies are prepared by the companies, and contracts of insurance are usually consummated by experts on the one hand, and inexperts on the other. The policy of the law is therefore to give them such an interpretation as to prevent a forfeiture whenever upon principles of fair construction, such a result is possible.

It is abundantly settled that, notwithstanding the conditions in the policy, if, at the time the insurance was effected, or afterwards, there were conditions, uses, or incidents of the risk which were in conflict with conditions in the policy, and which were known to the

insurer or its agents, whose knowledge is imputable to the company, such conditions, uses, or incidents cannot be used to defeat a recovery after a loss has occurred. Issuing or continuing a policy of insurance with full knowledge by the company of existing facts, which, according to a condition of the contract makes it voidable, is a waiver of the condition. If it were otherwise, the company would be enabled to perpetuate a fraud upon the assured: *Home Insurance Co. vs. Duke*, 84 Ind., 253; *Ætna Ins. Co. vs. Shryer*, 85 Ind., 362; *Excelsior etc. Ass'n vs. Riddle*, 91 Ind., 84; *Indiana Ins. Co. vs. Capehart*, 108 Ind., 270, 8 N. E. Rep., 285. Thus it has been held in a somewhat analogous case that notwithstanding an insurance policy contained printed stipulations almost identical with those above set out in respect to obtaining other insurance, and in respect to matters which should not be construed as a waiver of any condition or restriction contained in the policy, yet where an agent whose authority was not shown to have been restricted, inserted in the policy "\$3,000 other insurance permitted," and who was shown to have had knowledge that other insurance had been obtained, but conveyed to the insured the impression that the written consent of the company was not necessary, it was held that the insurance company was estopped to dispute the validity of the additional insurance: *Westchester Fire Ins. Co. vs. Earle*, 33 Mich., 143; *Hadley vs. Insurance Co.*, 55 N. H., 110; *Pittney vs. Glens Falls Ins. Co.*, 65 N. Y., 6; *American Ins. Co. vs. Luttrell*, 89 Ill., 314.

The tendency of the modern cases is to hold that if notice be duly given to company or its agents of additional insurance, or if actual knowledge is brought home that other insurance exists, or has been obtained, and no objection is made, the company will be estopped from insisting on a forfeiture, because its consent was not indorsed on the policy: *Wood, Fire Ins.*, secs. 382, 383; *May, Ins.*, secs. 369, 370. Having knowledge of the other insurance, the company may manifest its dissent by canceling its policy, otherwise it would be treated as having assented, and waived compliance with the condition. This does not deny to insurance companies the right to impose conditions upon which they will assume risks. It does nothing more than to prevent them from taking advantage of conditions when they have full knowledge of incidents and facts connected with the risk which are inconsistent with the conditions imposed. It should be observed that the authorities make a distinction in this regard between mutual insurance companies whose charters require that the consent of the company shall be indorsed on the policy in

respect to certain matters, and such companies as regulate-matter under consideration by contract merely.

The principles relied on, although abundantly supporting in cases somewhat analagous to this, do not rest on the facts of the appellant's case. The case made by the first of the complaint proceeds upon the theory that another policy of insurance had been taken out by the assured in the Co. of Brooklyn, New York, after the issuance of the policy and before the destruction of the property by fire. To avoid the effect of the condition providing for a forfeiture of the policy by the averment that it was agreed that the plaintiff have permission to take out additional insurance to the amount of \$1,000, in any company and at any time she desired, and that the company agreed to insert such a stipulation in the policy, but wholly failed to insert the stipulation as required. It does not appear when this agreement was made, whether before or after the execution of the policy. If it was made before, it does not appear that the appellant was induced to accept the policy without full knowledge that the stipulation was absent, and if after, the complaint ask for a reformation of the contract.

The appellant argues that a fair reading of the contract leads to the conclusion that it was made subsequent to the issuance of the policy. If this be conceded, it in no wise helps the appellant. If it were admitted that the oral agreement relied on was made, it affects no substantial modification of the original contract. The event, permission to take other insurance was to be given by the company. Such permission could only have been given by the assured, and in signing the policy to the company or its agent, and requesting that the stipulation be written in or upon the policy. After the execution of the policy, it was presumably in the possession of the company. It does not appear that she ever requested that the stipulation be inserted, or that the company ever had any notice that she had taken or desired to take out additional insurance. The company was therefore guilty of no error or wrong. The position of the appellant comes to this: that the policy was executed, an agreement was made that other insurance might be taken, and that a written stipulation to that effect should be inserted in the policy. Other valid insurance was taken out without any notice to the company, or request to insert the stipulation as agreed upon, and now it is said the company is estopped from enforcing upon the condition printed in the policy. This position

tainable. As has been seen, insurance companies are estopped to insist upon the enforcement of conditions when they have knowledge of existing facts which are inconsistent with the conditions imposed. Knowledge of the facts raises a presumption that the company waives that condition, and upon principles of honesty and fair dealing, the law holds it estopped to say to the contrary when such knowledge is shown. Admitting all the facts pleaded to be true, the insurance company has been guilty of no misconduct upon which an estoppel can be predicated. The assured has chosen to stand upon the policy as she received it. With the concession in her complaint that she violated a condition of the policy by taking other insurance without the consent of and without notice to the company or its agent, the court could not have done otherwise than sustain the demurrer.

The second paragraph of the complaint waived any right or claim to recover for the destruction of the building, and proceeded only for the loss of the furniture and household goods covered by the policy. To this paragraph the company answered the condition against obtaining other insurance on the property insured, or any part thereof, without the written consent of the company, and alleged that since the issuance of the policy sued on, other valid insurance had been so obtained upon the hotel building. The answer further averred that the furniture covered by the policy was contained and used in the hotel, and that both formed one risk, and were insured by the same contract, and upon one and the same consideration. This was held to be a sufficient answer. Since part of the insurance was apportioned to the building and part to the furniture and household goods therein, the question presented is whether it was competent for the plaintiff to recover that part apportioned to the furniture and household goods, notwithstanding the policy had been voided as to the building. On appellant's behalf the argument is that the contract is divisible, and that it does not follow that because it was voided (in part, it was voided in whole. There) is apparently some (conflict) of opinion as to the construction of contracts of insurance, and as to the right of the assured to recover in cases somewhat analogous to that under consideration. Where the contract is entire, it seems to be conceded that a breach of condition affects the entire risk; but the authorities are not uniformly agreed as to what constitutes an entire contract as applied to policies of insurance. So far as we are apprised the question presented has not been heretofore considered by this court. Confirming the decision

to the case in hand, our conclusion after a careful examination of the authorities, is that the policy under consideration is to be construed as an entire, indivisible contract in respect to the conditions of insurance. The purpose of inserting conditions against other insurances is manifestly to protect the company from the hazard of loss of insurance by compelling the assured to continue to be personally interested in the preservation of his property. The condition that the vigilance of the property-owner will be stimulated by the fact that he will be more watchful to guard against fire in case his property is such that its destruction by fire will entail a loss greater than a benefit upon him : *Phoenix Ins. Co. vs. Lamar*, 1

In order, therefore, to give effect to the condition of the policy, and to carry out the intent and purpose of the contract, it follows necessarily that where the property covered by one policy, although consisting of several separate items, appears to be so situated as to constitute one risk, then, even though separate amounts of insurance are specified for each separate item or class of property, if the policy is so drawn that the condition for the contract and the risk are both indivisible, the policy must be treated as entire nevertheless. To such a policy the principles governing entire and indivisible contracts are applicable. The reason that the matter which renders the policy voidable is the same which affects the risk of the insurer in respect to the other items of property in the same manner as it affects those items in respect to which the contract is voided. In such a case the only effect of apportioning the amount of the insurance upon the separate items of property specified in the policy is to limit the extent of the company's liability to the sum specified upon each item or class of property. While many well-considered cases seem to justify a more liberal conclusion than that above stated in regard to the interpretation of insurance contracts, we believe that, in the main, they may be harmonized on the principles above stated, which give us the better view of the subject : *Ætna Ins. Co. vs. Reed*, 55; *McGowen vs. People's Ins. Co.*, 54 Vt., 211; *Commonwealth vs. Pennsylvania Ins. Co.*, 56 Pa. St., 210; *Schumitsch vs. Aetna Ins. Co.*, 48 Wis., 26; *Hinnman vs. Hartford Ins. Co.*, 30; *Plath vs. Minnesota etc. Ass'n*, 23 Minn., 479; *Bowman vs. Aetna Ins. Co.*, 40 Md., 620; *Moore vs. Virginia etc. Co.*, 28; *Lovejoy vs. Augusta Ins. Co.*, 45 Me., 472; *Richards vs. Aetna Ins. Co.*, 46 Me., 394; *Gold vs. York Ins. Co.*, 47 Me., 110; *Day vs. Charter Oak Ins. Co.*, 51 Me., 110; *Day vs. Charter Oak Ins. Co.*, 51 Me., 91; *Lee vs. Howard Ins. Co.*, 3 Gray, 583;

Howard Ins. Co., 8 Gray, 33; Freismith vs. Agawan etc. Co., 10 Cush., 537; Brown vs. People's Mut. Ins. Co., 11 Cush., 280; Gerver vs. Hawkeye Ins. Co., 28 N. W. Rep., 555; Wood, Fire Ins., sec. 165.

In the following, among other cases which involved suits upon insurance policies wherein different properties were insured for separate sums, the contracts were held divisible, and the policy-holder in each instance allowed to recover as to some of the separate items, notwithstanding there had been a violation of some condition which avoided the policy as to the other items included in the same policy: Merrill vs. Agricultural Ins. Co., 73 N. Y., 452; French vs. Chenango Ins. Co., 7 Hill, 122; Koontz vs. Hannibal etc. Co., 42 Mo., 126; Loehner vs. Home Ins. Co., 17 Mo., 247; Commercial Ins. Co. vs. Spankneble, 52 Ill., 531; Hartford Ins. Co. vs. Walsh, 54 Ill., 164.

While we concur in the suggestion that courts incline towards such a liberal construction of insurance contracts in favor of the assured as, if possible, to avoid a forfeiture, yet where parties have without fraud, mistake, or surprise, deliberately entered into a contract, that alone must be looked to as furnishing the measure of their respective rights and obligations: Phoenix Ins. Co. vs. Lamar, *supra*. Courts cannot by construction compel insurance companies to assume obligations which they have fairly guarded against, in order to protect themselves against imposition, so that their solvency may be legitimately preserved in order to afford indemnity to policyholders who observe their contracts.

In the case under consideration, the risk on the furniture was affected by the same cause that rendered the policy void upon the building. It follows that the policy was avoided in toto. Judgment affirmed with costs.

SUPREME COURT OF INDIANA.

Appeal from Decatur C. C.

INSURANCE COMPANY OF NORTH AMERICA

vs.

MARY BRIM.*

Where it is claimed that the date of expiration had been altered policy subsequently to its delivery, the burden of proof is upon the company alleging it.

Where such policy named a specific amount of premium for a specific term of insurance, the error of excluding evidence as to the rate charged for a certain term, if any, was harmless, if the rate, according to the policy, neither coincided with that term nor the term as claimed by the insured, but was between the two.

Testimony of the agent regarding certain matters occurring in the lifetime of the original insured who had since died and whose wife had succeeded to his interest in the property and policy, were properly excluded.

Under a statute forbidding provisions requiring notice to be given more than five days, a notice within a reasonable time thereafter is sufficient unless the time be limited in the policy, and it is for the court to determine what in law is a reasonable notice and to so instruct the jury on the disputed facts. Under such a statute a provision requiring notice to be given within a certain time is void.

Where the statute provides that any stipulation by a foreign insurer limiting the right to sue to less than three years after a loss, shall be a limitation-clause restricted to one year in the policy is void.

MOORE and MARSHALL, *for Appellant.*

MULLER and GAVIN, *for Appellee.*

MITCHELL

This was a suit by Mary Brim against the Insurance Company of North America, to recover upon a policy of insurance. The complaint alleges that on the twenty-sixth day of June, 1879, the com-

* Decision rendered, June 15, 1887.

issued a policy of insurance, whereby it insured certain farm-property therein declared, owned by Philip Brim, to the amount of \$2,500, against loss or damage by fire from the twenty-sixth day of June, 1879, to the twenty-sixth day of June, 1884. The death of Philip Brim, and the succession of plaintiff to the rights of the decedent in the property and policy, the destruction of certain parts of the property by fire, and the performance by the assured of the conditions of policy, are alleged. The company answered by a general denial, and a plea of non est factum, denying the execution of the policy. The question chiefly contested at the trial was whether the policy expired on the twenty-sixth day of June, 1882, or on the twenty-sixth of June, 1884. The contention of the insurance company was that the date of the expiration of the policy, as written on the face, and indorsed upon the back thereof, had been changed from 1882 to 1884, by the addition of a perpendicular to the figure "2" at each place, so as to make it appear thus, "1884." Evidence was heard in support of the respective theories of the parties. Pertinent to this feature of the case, the court gave the jury the following charge: "If the evidence, by a fair preponderance, shows that the policy sued on was signed and delivered by the defendant to the plaintiff, and the defendant claims an alteration thereof, the burden is upon the defendant to show such alteration, and, if an alteration appears upon it, that it was made after delivery." The jury found, in answer to an interrogatory submitted to them, that there was no alteration apparent upon the face of the policy. The law upon the subject involved in the instruction was given to the jury correctly.

It was for the court and jury to judge from an inspection of the policy, concerning the character of the alleged alteration. If there was nothing suspicious upon the face of the instrument tending to raise a presumption that it had been altered after its execution, it was not necessary for the plaintiff, after proving its execution, to offer any proof in the first instance upon the subject of an alleged alteration. Within all the authorities, the burden of proof in such a case is upon the party alleging the alteration: *Meikel vs. State Sav. Inst.*, 36 Ind., 355; *Stoner vs. Ellis*, 6 Ind., 152; *Cochran vs. Nebeker*, 48 Ind., 459; *Fitzgerald vs. Goff*, 99 Ind., 28; *Sirrine vs. Briggs*, 31 Mich., 443. The jury, having found that the policy presented no indication of having been altered, were not required to examine the vexed question, concerning which the books abound in diverse decisions, as to what presumptions will be indulged if the

face of the instrument itself presents a suspicious appearance: *Neil vs. Case*, 25 Kan., 510. Since there was no alteration apparent upon the face of the policy, whether the instruction of the court upon that subject was technically accurate or not, it was not influential in producing the verdict: *Cleveland etc. R. Co. vs. Newell*, 104 Ind., 264-273, 3 N. E. Rep., 836.

During the progress of the trial, the appellant produced a witness, and, in answer to suitable questions for that purpose, proposed to prove that the uniform minimum rate established and existing between the different insurance companies represented in Greensburg, at the time of the issuance of the policy in suit, was 1 per cent for three years, and $1\frac{1}{2}$ per cent for five years, on detached farm-property, such as that covered by the policy in question. The evidence was excluded. Without determining the abstract question concerning the admissibility of evidence of the character of that offered, it is manifest that the exclusion of the evidence proposed was harmless in this case. The policy recited that the premium paid as a consideration for \$2,500 insurance was \$30. There was no evidence controverting this. It is therefore apparent, whether the established rate of insurance in the city of Greensburg was or not in accord with the proposed evidence, the appellant's agent did not, in this instance, conform to the rate established. If the policy was for three years, as the appellant contended, the premium charged was \$5 more than the rate. If it was for five years, the premium was less than the rates by seven dollars and a half. The evidence would have proved nothing to the appellant's advantage if it had been admitted. There was no error, therefore, in excluding the testimony. The appellant proposed to prove, by the agent who issued the policy, certain matters in respect to the policy which must have occurred, if at all, in the lifetime of Philip Brim, deceased, with whom the contract of insurance was negotiated. Mrs. Brim succeeded to the property insured as heir, and to the policy of insurance by assignment. The agent was permitted to testify in respect to certain matters testified to by Mrs. Brim which occurred in the lifetime of her deceased husband. Concerning other matters so occurring, the proposed testimony was excluded. There was no error in this: Sec. 500, Rev. St., 1881; *Peacock vs. Albin*, 39 Ind., 25; *Reynolds vs. Linard*, 95 Ind., 48. The fire occurred on the tenth day of August, 1883. The evidence tended to show that notice of the loss was communicated to the company's agent on the thirteenth day thereafter. There was a

condition in the policy requiring that immediate notice should be given of any claim made thereunder. Some circumstances appeared in the evidence tending to show an excuse for not notifying the agent at an earlier period. Relevant to this feature of the case, the court instructed the jury, in substance, that the condition requiring immediate notice was void; that if the plaintiff, taking into consideration all the circumstances, gave notice within a reasonable time, the provisions of the policy in that regard were complied with, and that it was a question of fact for the jury to determine, under all the circumstances, what was a reasonable time. Section 3,770, Rev. St., 1881, relating to foreign insurance companies doing business within this State, prohibits any such company from inserting certain conditions in its policy. Among others, conditions requiring notice of loss to be given forthwith, or within a period of less than five days are prohibited. The statute provides that any condition inserted in a policy contrary to its provisions shall be void. The effect of the statute is to invalidate any provision in a policy issued by a foreign insurance company which requires notice of a loss to be given within five days. The law makes such a condition in a policy conclusively unreasonable. Construed in connection with the law, the condition requiring immediate notice must be held to mean that the assured should use reasonable diligence in giving notice of the loss. What constitutes reasonable diligence or reasonable notice must depend upon all the circumstances of each particular case: *Railway Co. vs. Burwell*, 44 Ind., 460; *Wood, Fire Ins.*, § 414. The purpose of the notice is to enable the company to take proper precautions for its own protection. The notice must be reasonable under all circumstances. Where the facts are not in dispute, or where they have been ascertained by the proper tribunal for that purpose, it becomes a question of law for the court to determine whether, under the facts and circumstances of a given case, the notice was reasonable. Where the facts tending to show an excuse for the delay are in dispute, or whether it is a disputed question whether the delay was occasioned by certain facts, it is for the jury to ascertain the facts, and the cause and effect of the delay, and, under proper instructions from the court, as to the force and effect of the facts found, determine whether or not, under all the circumstances, reasonable notice of the loss was given: *Wood, Fire Ins.*, § 412. This rule, properly applied, does not in any event leave it to the jury to determine what facts in law constitute a reasonable notice. This is the function of the court, to be discharged

by properly instructing the jury as to the legal value of the facts as they may be found from the evidence. In view of the last clause of the instruction complained of, it was eminently proper that the court, either of its own motion, or at the request of the appellant, should have instructed the jury further as to the facts and circumstances necessary to constitute a legal excuse for the delay, and under what circumstances, within the proof, the notice might have been deemed sufficient. The instruction in and of itself was not, however, erroneous. The appellant, so far as we are advised, made no request for further instructions. The case is therefore within the rule which denies a reversal in case an instruction is substantially accurate, but which might with great propriety have been supplemented with further instructions in order to render it more intelligible and complete: *Wilson vs. Trafalgar etc. Co.*, 93 Ind., 287; *County of Howard vs. Legg*, 11 N. E. Rep., 612 (present term).

Without detailing the circumstances which appeared in evidence, it is sufficient to say, since it does not appear that the company made any objection to the claim on account of the insufficiency of the notice, or that any detriment resulted to it on account of delay, the notice was, under all the circumstances, reasonably in time: *Wood, Fire Ins.*, § 414. Of course, if the policy had required notice be given within a definite time, not within period prohibited by statute, or if the notice had been unreasonably delayed, without any circumstances of excuse, a failure to object to a notice given, after the right of action on the policy had expired, would not revive the right: *Trask vs. State etc. Co.*, 29 Pa. St., 198. This case is not within that rule, the policy contained a provision to the effect that, if a suit or action should be commenced thereon after the expiration of one year from the date of the loss, the lapse of time should be deemed conclusive against the validity of the claim. This suit was not brought until after the expiration of one year, and it is now contended that the above-mentioned stipulation defeated the plaintiff's right to recover on the policy. The statute already referred to enacts that any condition or agreement in a policy of foreign insurance "not to sue for a period of less than three years" shall be void, and it also provides that any condition inserted in a policy to avoid the provisions of that section shall be void. It is at once obvious that the condition in the policy and provisions of the statute cannot stand together. It is said the provision in the policy, the practicable effect of which was to bar a right of action

after one year, was such a contract as the parties had a right to make, and that such right was not subject to legislative control. While the general proposition may be conceded that insurance companies have the right to contract that parties shall assert their claims against them in a reasonable time: *Riddlesbarger vs. Hartford Ins. Co.*, 7 Wall., 386. Yet the constitutional right of the legislature to prescribe the terms upon which the foreign corporations may transact business within the State is also abundantly established: *Farmers etc. Ins. Co. vs. Harrah*, 47 Ind., 236; *Bank of Augusta vs. Earle*, 13 Pet., 519; *Paul vs. Virginia*, 8 Wall., 168; *Ducat vs. Chicago*, 10 Wall., 410; *Cooper Manuf'g Co. vs. Ferguson*, 113 U. S., 727; 5 Sup. Ct. Rep., 739; *Cincinnati Mut. etc. Co. vs. Rosenthal*, 55 Ill., 85; *Thorne vs. Travelers Ins Co.*, 80 Pa. St., 15.

The statute must be regarded as a legislative declaration that less than three years is an unreasonable limit within which to require parties holding claims under a policy of foreign insurance to assert their claims, or to be forever barred. This statute was in force when the contract of insurance was consummated, and it must be conclusively presumed that the contract was made with a due regard for the law. In so far as the statutes and the conditions in the policy are in conflict, the statute must prevail. It is said the statute is unconstitutional. Counsel have not called our attention to any provision of the constitution which is supposed to be infringed, and we know of none. Judgment affirmed with costs.

SUPREME COURT OF WISCONSIN.

STATE

vs.

UNITED STATES MUT. ACCIDENT ASS'N.*

A foreign company not licensed to do business in Wisconsin, but charged with carrying on the business of accident insurance in this State, is not liable to the penalty imposed in Rev. St. of 1878, § 1954, upon companies failing to file annual statements.

H. W. CHYNOWETH, *for Respondent.*

FINCHES, LYNDE & MILLER, *for Appellant.*

COLE,

The main question in this case is, does the complaint state a cause of action? The action is brought to recover the penalty given by section 1,954, Rev. St., for a failure to make and file in the office of the commissioner of insurance the annual statement of its business, etc., as required by that section. The complaint alleges, in substance, that the defendant is a corporation organized and existing under the laws of the State of New York, and as such has been doing business continually, for five years last past, engaged in the business of accident insurance, having its principal office and place of business in the city of New York; also, as such accident insurance corporation was, in the month of January, 1882, and has been doing so ever since, including the month of April, 1886, engaged in doing and carrying on the business of accident insurance in this State, and has issued policies of insurance to residents and citizens of this State, in

* Decision rendered, June 1, 1887.

them against loss or damage occasioned by personal bodily injuries by accidents or otherwise, and has received premiums and assessments upon said policies, but has failed and neglected, during all this time, to make and deposit in the office of the commissioner of insurance the annual statement required by the statute, whereby it has become liable or indebted to the State in the sum of \$26,000, according to the provisions of section 1,954. The objection taken to the complaint is that it does not allege or state that the defendant has been licensed to do business in this State. This, it is claimed, is an essential allegation, because an unlicensed foreign corporation is not within the meaning or letter of the statute; consequently not liable for the penalty.

Section 1,954 reads as follows: "Every life or accident insurance corporation doing business in this State shall, on or before the first day of March in each year, file in the office of the commissioner of insurance a statement of its business standing and affairs, signed and verified by the affidavits of the president or vice-president, and of the secretary (but, in case of a foreign corporation, it may be signed and verified by the resident managing officer thereof in the United States), and covering the year ending the preceding thirty-first day of December, and exhibiting the followings facts and items." Then follow twenty-eight different items of information which must be embodied in the statement, and then is added this clause: "For any failure to make and deposit such annual statement, or to promptly reply in writing to any inquiry addressed by the commissioner of insurance in relation to the business of such corporation, or for willfully making any false statement therein, every such corporation or officer, so failing or making such false statement, shall forfeit \$500, and for every neglect to file such statement an additional \$500 for every month that such corporation shall continue thereafter to transact any insurance business in this State until such statement be filed."

The inquiry, therefore, is, does this provision apply to and include a non-resident corporation which has not been licensed, or does it only apply to such as have the right and authority of doing business in this State? We are constrained to hold that it only applies to the latter class of corporations. There are a number of provisions of the statute that lead us to adopt this view. Section 1,220 provides that every company transacting the business of life or accidental insurance in this State shall, on or before the first of March in each year pay to the State treasurer, as an annual license-fee for

transacting such business, the sum of \$300. Such license, when granted, shall authorize the company to which it is issued to do business until the first day of March in the ensuing year, and shall be sooner revoked or forfeited according to law. Subsequent sections prohibit such a corporation from doing business unless it has a certain amount of paid-up capital, and has procured a license from the commissioner authorizing it to issue policies of insurance. Section 1,947. The commissioner is authorized from time to time to examine the capital stock and assets of such company, and if they are not equivalent to this valuation, he is to notify the company to discontinue issuing new policies until such time as its assets shall become equal to its liabilities. Section 1,949. Every accident insurance company not organized under the laws of this State, before doing business therein, is required to deposit with the commissioner a copy of its charter, and a statement signed and verified by the affidavit of the president or vice-president of the company, as prescribed for the annual statement mentioned in section 1,953. Then follows the section in regard to the form of the statement, and what it shall contain. By section 1,955 it is provided that if such corporation shall violate or fail to comply with any provision of law applicable thereto, or in case its capital shall be insufficient, and shall not be made good within such time as the commissioner shall require, it is made the imperative duty of the commissioner to revoke any and every authority, license, or certificate granted to such corporation, or agent thereof, to transact business in this State, and no such agent or corporation shall thereafter transact business in the State of insurance in this State until again duly licensed. Section 240, Laws 1880. There are other provisions, also, which make it a misdemeanor, punishable by fine of not less than \$100 nor more than \$500 for each offense, for an officer or agent to do business in any manner and a non-domestic insurance company in this State without first procuring a certificate of authority from the commissioner as provided by law; and any person who issues insurance on behalf of a corporation, or transmits an application for insurance or a policy other than for himself, or makes a contract of insurance, or collects any premium, is declared to be an agent of the corporation to all intents and purposes, unless it is otherwise provided, he renders his services gratuitously.

In view of these provisions for granting a license to a corporation to do insurance business, and in view of the provisions for granting a license to an insurance company to make contracts and issue policies

be legal, and for exercising visitatorial power and control over them, to a great extent, by examining into their pecuniary condition, the value of their assets, etc., imposing penalties for a failure to reply in writing to an inquiry of the commissioner in relation to its business, or for failure to file the annual statement prescribed, we think it plain that the legislature was only intending to regulate such companies as had submitted to the jurisdiction of the State, filed a copy of its charter, and procured the necessary license to transact its business lawfully, and were not acting with reference to companies which had never submitted to its jurisdiction, and were not licensed to do business in the State. Waiving the question as to the power of the legislature to impose a penalty upon a non-domestic insurance company, which has never submitted to our laws or jurisdiction, of \$500 for not promptly replying to an inquiry of the commissioner in relation to its business, or for failing to make an annual statement, or for making a false statement, still we think the legislature has not attempted to do this by the provision in question. Undoubtedly the legislature may prescribe the conditions upon which such corporations shall transact business within its limits; may compel them to procure a license for the lawful transaction of such business; or may "exact such security for the performance of their contracts with its citizens as in its judgment will best promote the public interest. The whole matter rests in its discretion." *State vs. Doyle*, 40 Wis., 176.

The learned counsel for the plaintiff says the words used in the statute, "every life or accident insurance corporation," are general, making no exceptions, and embrace both those corporations which have been doing business by complying with the laws of the State, and those which have been or are doing business in violation of the laws. True, the words are comprehensive enough to include both classes of corporations; but the question is, do not all the provisions relating to the subject show that the section prescribing the penalty was intended to apply only to such corporations as had taken out a license? In the next section we find the language, "if any such corporation"—plainly referring to those included in the previous section—"shall violate or fail to comply with any provision of the law applicable thereto, it shall be the imperative duty of the commissioner to revoke any and every authority, license, or certificate granted to such corporation." This language, by the strongest implication, indicates that it was corporations which had once been licensed which the legislature had in mind and was dealing with.

It is said that it is highly absurd to suppose the legislature intended that those insurance companies which had never made a pretense of complying with the insurance laws of the State could do business here *ad libitum* without incurring any penalty whatever. But we have referred to those provisions enacted to secure obedience by insurance companies to the laws of the State,—the provision prohibiting a company from making contracts of insurance or issuing policies before it has obtained a license authorizing it to do so; also the one imposing a fine upon any agent or person who should aid in any manner an insurance company in transacting its business in this State without first obtaining from the commissioner a certificate of authority. If these provisions are not adequate or effectual to secure obedience to the laws on the part of non-resident companies, the remedy is with the legislature.

The counsel for the defendant argues that the words "doing business in this State" necessarily imply and refer to corporations which have the lawful right or authority to make contracts of insurance. The words, he says, are words of limitation, and clearly designate that class of corporations. As a general rule, laws are enacted to regulate the rights and duties of the citizens of the State, including of course, all corporations subject to its sovereignty. And the laws in regard to insurance are intended to regulate and bind such corporations as the State may exercise its jurisdiction over. But we fail to find that the laws in that matter were intended to regulate a non-resident corporation, or impose a penalty upon it for a neglect of duty before it has come within the State and placed itself upon the footing of a domestic corporation.

But it is further claimed in behalf of the plaintiff that this view of the statute is in direct conflict with the decision in *State vs. United States Mut. Accident Ass'n*, 31 N. W. Rep., 230. The question in that case was whether there had been such a service of process as gave the court jurisdiction of the defendant. The summons had been served by leaving a copy with the agent of a foreign insurance company which had not obtained a license to do business in this State. Upon the facts of the case, the service was held to be good. The case is quite distinguishable from the one at bar. It is true it is said in that case that section 1,954 applies to every life or accident insurance company doing business in this State. This remark, however, must be considered in connection with the facts and case in which it was made. It was perfectly correct, considered in relation to the question decided there; but cannot control our judgment.

here, where the question is whether the last clause of section 1,954, which imposes a penalty for a failure to do certain acts, implies to a non-resident corporation which has never been licensed to do business in this State. What was the subject-matter in the case above referred to does not appear. It might well be that it was a contract, the validity of which the company would be estopped from denying. But, whatever it was, for obvious reasons, the expression there made cannot control our judgment upon the question presented here. We must therefore hold that the complaint is defective, because it does not allege or state that the defendant had been licensed to do business in this State so as to bring it within the provision imposing the penalty sought to be recovered. Without noticing the other objections taken to the complaint, we think, for the reasons above given, the demurrer to it should have been sustained.

The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

SUPREME JUDICIAL COURT OF MASSACHUSETTS

ADDISON

vs.

NEW ENGLAND COMMERCIAL TRAVELERS' ASSOCIATION.*

By the charter of a beneficiary association, the persons who could designate as beneficiaries were limited to his children, and other persons dependent upon him, and the association provided that, if the insured made no designation, should be paid to his widow, or, if he left no widow, to the trustee of his minor children. The insured, at the time of his designation, had a wife and two daughters, and in his membership, in answer to the question, "To whom will the death-loss be paid?" answered, "To my heirs," and in a separate statement to state the relationship of any of the persons to whom payment was to be made, he answered, "Wife or daughters." *Held*, That upon the death of the insured, money was to be paid to the widow.

Contract by the widow of James Addison to recover from the association \$3,000, payable under the terms of his membership in said association held by the said Addison. On a hearing in the superior court without a jury, before the court found that the meaning and intent of the said designation in his designation of the persons to whom the amount was to be paid, was that the wife and two daughters of the insured were to receive the death-loss; and, one of the daughters, during his life, the said widow and surviving daughter were to receive the fund in equal shares, the sum of \$1,500 to be paid to the widow and a like sum to be paid to the administrator of the estate of the daughter, who had died subsequent to the death of the insured.

* Decision rendered, June 23, 1887.—From *Northeastern Reporter*.

this finding both parties excepted, and the case was reported to the supreme judicial court. Additional facts appear in the opinion.

J. B. RICHARDSON, for Margaret Addison.

The objects of this association are set out in its charter, and in chapter 204, Acts 1877 (Pub. St., c. 115, § 8). Chapter 195, Acts 1882, cannot affect the contract made in 1878: *American Legion of Honor vs. Perry*, 140 Mass., 580, 592; 5 N. E. Rep., 634. The contract made by James Addison with the association was for the benefit only of his "widow, orphans, and other dependents of" his. It was not within the scheme of the association to make provision for the benefit of estates, or of heirs, which is the same thing: *Elsey vs. Odd Fellows' Mut. Relief Ass'n*, 142 Mass., 224, 7 N. E. Rep., 844; *Briggs vs. Earl*, 139 Mass., 473, 1 N. E. Rep., 847. "My heirs," therefore, was not a legal or proper designation of a beneficiary. It is not a designation at all of a "person or persons," as required by the constitution and by-laws: *Elsey vs. Odd Fellows' Mut. Relief Ass'n*, *supra*. Or if, under any circumstances, it could be held to be a designation (if there was no other), it is certainly not to control or vary the definite designation of "wife or daughters," made in the application. In his answers to the questions on the application, Mr. Addison's attention was probably not called at first to the duty of particularly designating the person or persons to whom he wished the loss paid. He was not in the first question, asked to do that; but, when his attention was called to the duty of particularly designating them, he says, "Wife or daughters." But if you read it with the words "to my heirs," reading them all together, it is merely as if he had said, "I will have it paid to my heirs; that is, I mean by that, my wife or daughters." The words on the certificate and stub were not the acts of the deceased. Certainly the wife is not excluded: *Sweet vs. Dutton*, 109 Mass., 589; *Lavery vs. Egan*, 143 Mass., 389, 9 N. E. Rep., 747.

The question of "dependency" is an important one; decisive, we think, in favor of Mrs. Addison. She was at all times dependent upon the deceased. Mrs. Pratt was not dependent upon him at the time when the question of dependency is to be inquired into, viz., the time of his death, or when the money is payable: *Briggs vs. Earl*, 139 Mass., 473; 1 N. E. Rep., 847. It is clear that the questions of orphanage and of minority of children are referable to the time of the death of a member, not to the time of his becoming a member of the association. See *Briggs vs. Earl*, *supra*. The place of

Mr. Addison was to support his wife, and, after the death of one daughter, and the marriage of the other, there was no other person whom it was his place to support. Is it not to be presumed that Mr. Addison intended that this fund should go to the support of her whom it was his legal and social duty to provide for? And she is the only person now left whom it can be claimed was a beneficiary: *Ballou vs. Gile*, 50 Wis., 614; 7 N. W. Rep., 561. There is no authority for reading "and" for "or" in this designation; the context does not require it. The word "heirs" (even if it can be brought in to aid Mr. McDonald's claim) does not require the money to be given to two or more persons, as the learned court thought. "Wife or daughters" does not mean both. On this point it is like *Whitcher vs. Penley*, 9 Beav., 477; *Crooke vs. De Vandes*, 9 Ves., 197; *Turner vs. Moor*, 6 Ves., 557; *Montague vs. Nucella*, 1 Russ., 165. It is hardly conceivable that Mr. Addison meant that this money, or any part of it, should go in the way it will, if given to Mr. McDonald. We submit that such disposition of it would defeat the benevolent and charitable objects of the association, and the intention of the parties to the contract. Upon all considerations, the objects of the association, the actual designation by the deceased, his declared intention, the presumption of his intention from his duty to her, and her circumstances, and upon all the considerations of dependency, and the death of both the daughters, this money should now be paid to Mrs. Addison. If not in her own right, then to her as administratrix.

GEO. FRED. WILLIAMS, for James McDonald, administrator of Mary E. Pratt.

The designation. The constitution of the association, art. 1, § 2, provides that the directors shall pay the death-loss "to the person or persons previously designated by the deceased upon his application for membership, upon the books of the association, and upon his certificate of membership." The reference in art. 10, § 1, to the payment of the death-loss to "such person or persons as the deceased may have designated to receive the same," must refer to the constitutional designation, which appears not only in the application, but also upon the books of the association, and upon his certificate of membership. The only designation, therefore, is of "my heirs;" for nothing else appears in the books or the certificate, nor should the answer of the applicant to the second question stated in the report modify this designation. It is manifest that the first question

contemplated the naming of a person by name, and the second was intended merely to satisfy the association that the person or persons named were within the classes who might properly be designated. The answer to the second question was not intended, therefore, to have any effect as a designation, and the fact that the "wife or daughters" were not named in the record or certificate shows that such description was not intended as a designation. The construction of the designation "my heirs" should not, therefore, be affected by the subsequent answer; the construction must be of the contract into which the association entered, which was to pay to "my heirs:" *Elsey vs. Odd Fellows' Mut. Relief Ass'n*, 142 Mass., 224, 7 N. E. Rep., 844; *Barton vs. Provident Mut. Relief Ass'n*, 63 N. H., 535, 537, 3 Atl. Rep., 627; *Com. vs. Wetherbee*, 105 Mass., 149; *Bauer vs. Samson Lodge*, 102 Ind., 262, 1 N. E. Rep., 571.

It is evident that the applicant intended his death-loss to be paid to the persons upon whom the law would cast his estate. It was as to this fund a declaration of intestacy. The word "or" was not unnatural, and its use only shows that he intended not to qualify the legal meaning of the word "heirs." The word "heirs" signifies to laymen those who take an estate by inheritance; yet few assume to define who they are. When this applicant attempted to define the persons, he meant to say either "wife and daughters, whichever the law makes my heirs," or "wife and daughters, if they be all alive at my death." It would be manifestly absurd to use the word "or" to exclude as heirs the daughters, who were the only persons who were "heirs" beyond peradventure. The word "or" is often construed to mean "and," in order to carry the intention into effect: *Fairfield vs. Morgan*, 2 Bos. & P., 38; *Right vs. Day*, 16 East, 67; *Arnold vs. Buffum*, 2 Mason, 208; *Ray vs. Enslin*, 2 Mass., 554; *White vs. Crawford*, 10 Mass., 183; *Carpenter vs. Heard*, 14 Pick., 449, 453; *Litchfield vs. Cudworth*, 15 Pick., 24-27; *Parker vs. Parker*, 5 Metc., 134, 137; *Hunt vs. Hunt*, 11 Metc., 88, 98. In this case it is necessary to so construe the word "or," inasmuch as it has no sense otherwise.

The stub-book and certificate were properly admitted. The certificate of a benefit association is, in legal contemplation, a policy of insurance, and governed by the same rules of law: *Presbyterian Assur. Fund vs. Allen*, 15 Ins. Law J., 768, 7 N. E. Rep., 317; *Bailey vs. Mutual Ben. Ass'n*, 15 Ins. Law J., 793, 27 N. W. Rep., 770; *Dolan vs. Court Good Samaritan*, 128 Mass., 438. Hence the learned judge erred in treating the words "wife or daughters" as "the designa-

tion," and dividing the fund between the parties hereto as joint beneficiaries. This court has not yet directly adjudicated that in such a case the widow is a heir. This point is left undecided in *Elsey vs. Odd Fellows' Mut Relief Ass'n*, *supra*. This case is within the distinction made in *Fabens vs. Fabens*, 141 Mass., 395, 399, 5 N. E. Rep., 650. Nor does the recent case of *Lavery vs. Egan*, 143 Mass., 389, 9 N. E. Rep., 747. In any event, if the true designation be the "heirs" of James Addison, the widow is only entitled to one-third, and the surviving daughter should take two-thirds, of the fund, under the statute of distributions.

W. ALLEN, J.

The only designation which the deceased attempted to make was in answers to the printed questions in his application for membership. The persons whom he could designate were limited by the statute (St. 1877, c. 204) and by the charter or certificate of incorporation, to his widow, his orphan children, and other persons dependent upon him. The by-laws of the corporation provided that, if he made no designation, the amount should be paid to his widow, or, if he left no widow, to a guardian or trustee of his minor children. At the time of making his application, in 1878, he had a wife and two minor children, daughters. In answer to the question, "To whom will you have your death-loss paid?" he answered, "To my heirs." Had this been all, his meaning might have been doubtful. It could not have been presumed that he intended to include heirs who could not lawfully be designated, nor that he intended to exclude his widow, and it might be presumed that he had in mind only his wife and children, and intended to designate them. But it might have been doubtful whether he intended to designate them to take as distributees under the statute of distributions, or as beneficiaries under the charter and by-laws of the corporation. The word "heirs," used to designate such beneficiaries, excluding one class mere dependents, and including the other two, widow and orphan children, applies as naturally to the classes as to the individuals comprising them, and indicates the widow and orphan children quite as plainly as it indicates the widow and surviving daughters.

But we think that the answer to the next question leaves no doubt as to the meaning. The question was, "State the relationship of any of the persons to whom payable," and the answer is, "Wife or daughters." The answer involved a more particular description of the beneficiaries intended to be designated than was

contained in the former answer; and in thus designating them the applicant separates the two classes which he included in the general word "heirs," and says, in substance, "The person or persons to whom it is payable are my wife or my daughters." The answer is short and concise, but the meaning is sufficiently plain that he intended that the payment should be to his widow, or, if he left no widow, to his surviving daughters. This is the natural meaning of the language, and it is what would be expected. If his wife should survive him, she would have the care and nurture of their minor children, and she, and not they, would be the person to whom payment was intended to be made by the statute, and by the charter and by-laws of the corporation and the payment to her would be for their use as well as for her.

The intention that the money should be divided between the widow and surviving children is not in accordance with the purpose of the association, or the probable object of the applicant, and is not shown by the language of the designation: See *Hall vs. Hall*, 140 Mass., 267, 2 N. E. Rep., 700. If there was any designation, it was to the widow, or, if there should be no widow, to the surviving daughters. If there was no valid designation, the widow is entitled to the money. It is therefore unnecessary to consider the several objections presented to the sufficiency or validity of the designation. In any aspect of the case, the money is to be paid to the widow. Order accordingly.

SUPREME COURT OF PENNSYLVANIA.

Error to Common Pleas No. 4, Philadelphia County.

MANEELY, TRUSTEE, ETU.,

vs.

KNIGHTS OF BIRMINGHAM OF PENNSYLVANIA.*

The charter of X. declared its purposes to be "benefiting and aiding the widows and orphans of deceased members." A by-law provided that the benefits on the death of a member should be payable "to such person as the deceased may have designated to receive the same as appears on the books of the lodge of which he is a member." A., a member of X., designated his sister, B., from whom he had borrowed money, as the person to whom the benefits were to be paid. A. died, leaving a widow and minor children. B. paid A.'s dues during his illness, up to the time of his death. *Held*, that B. was entitled to the benefits, to the exclusion of A.'s widow; that, in the absence of any prohibitory or restrictive language in the charter denying to X. the right to contract specially with the member for the payment of benefits to persons other than his widow or orphans, the designation of B. was valid, and that such contract was not void by reason of necessary implication from the language of the charter.

Case stated between William M. Maneely, trustee for Mary A. Lamon, and Knights of Birmingham of Pennsylvania, as follows:—

The defendant is a corporation duly chartered under the act of Assembly approved the twenty-ninth day of April, A. D. 1874, and the supplements and amendments thereto. By section 5 of its charter, membership is limited to master Masons in good standing in the fraternity of Freemasons.

The second section of the charter of the defendant is as follows: "The purposes of this corporation shall be the maintenance of a society for the purpose of benefiting and aiding the widows and

* Decision rendered, March 28, 1887.—From *Atlantic Reporter*.

orphans of deceased members." This object is repeated in the first article of the constitution. By section 1 of article 19 of its constitution, it is provided that the sum of \$1,000 "shall be paid to such person or persons as the deceased may have designated to receive the same, as appears on the books of the lodge of which he is a member. If no designation has been made, then to his widow; if no widow survives, then to his child or children; in default of the foregoing, then to the mother of the deceased or other legal heirs; and in case there is no widow, children, mother, or legal heirs, the lodge may appropriate towards the expenses of the last sickness and funeral of the deceased the amount, not to exceed the sum to which such recipient would have been entitled."

On October 17, 1878, Joseph M. Maneely became a member of the corporation, to wit, Kensington Lodge No. 5 of the Knights of Birmingham of Pennsylvania, and subsequently, on July 24, 1884, he died, being at that time a member of the Masonic order, and of the corporation defendant, in good standing. The said Joseph M. Maneely, on the seventh day of February, A. D. 1881, desiring to borrow from his sister, Mary A. Lamon (on whose behalf this suit is brought by her trustee), the said sum of \$1,000, agreed to assign to her as security therefor all his estate, right, title, and interest in and to the said sum of \$1,000, to which his legal representatives would become entitled upon his decease, from the said corporation defendant; and, for the purpose of ascertaining whether said security would be sufficient, the said Mary A. Lamon sent her agent and trustee, the said William H. Maneely, to the secretary of the said subordinate lodge of the corporation defendant, one Ebenezer Cobb, to ascertain whether such an assignment could be made for her protection, whereupon the said secretary of the said corporation defendant, being apprised of all the facts aforesaid, and also of the fact that the said Joseph M. Maneely had then a wife and children living, answered the said plaintiff that if the said Joseph M. Maneely would designate the said Mary A. Lamon as the person entitled to receive the said sum of \$1,000, in accordance with article 19 of the said constitution, then the said benefit would be paid as designated to the said Mary A. Lamon, whereupon the said Mary A. Lamon, by the said William H. Maneely, her trustee, loaned to the said Joseph M. Maneely the sum of \$1,000, and the said Joseph M. Maneely, in accordance with said article 19 of the constitution, made and executed upon page 8 of a book authorized by the said corporation defendant for the purpose, the following designation, to wit:—

I, Joseph M. Maneely, being a member of Kensington Lodge No. 5 K. of B., do hereby authorize and direct the payments allowed to me by the constitution and by-laws of the grand lodge thereof, to be made to William H. Maneely, trustee for Mary A. Lamon; and, upon such payment being made, I, for myself, my heirs, administrators, and assigns, hereby release said grand lodge from any liability or claim whatever.

Witness my hand and seal this eighth day of February, 1881.

JOSEPH M. MANEELY. [L. s.]

LOUIS D. BELAIR. [L. s.]

EBENEZER COBB. [L. s.]

Subsequently the said Joseph M. Maneely became ill, and after so continuing for five months he died. The said sum of \$1,000, loaned as aforesaid, is still due and owing to the plaintiff by the said Joseph M. Maneely. During the five months mentioned, in order that Joseph M. Maneely should not fall in arrears in the payments which he was required to make to the corporation defendant, and in order to be entitled to the \$1,000 aforesaid upon his decease, the said Mary A. Lamon paid his dues to the St. Paul's Lodge No. 481 of the Masonic fraternity, of which he was a member, amounting to \$13, and also paid his dues and assessments to the said subordinate lodge of the corporation defendant in the following sums, and upon the following dates, to wit: February 21, 1884, seven dollars; March 20, 1884, one dollar; April 17, 1884, two dollars; May 5, 1884, one dollar; June 19, 1884, one dollar; July 17, 1884, one dollar,—whereby the said Joseph M. Maneely remained up to the time of his death a member in good standing of the said corporation defendant, and the said corporation defendant upon his death became bound to pay the sum of \$1,000. Upon the death of the said Joseph M. Maneely, the said plaintiff made demand of the said corporation defendant for the payment of the said sum of \$1,000, in accordance with the said designation on its said books, which payment was refused.

The said Joseph M. Maneely left surviving him a widow, Caroline, and four minor children, to wit, Joseph L., aged 16 (born of a former marriage), Sarah, aged 12, Samuel, aged 10, and Martha, aged 8, children of said Caroline; and his said widow, Caroline, also made demand of the corporation defendant for the payment of the said sum, claiming that as widow she was entitled thereto, notwithstanding said designation, which payment was also refused. Defendant is, however, ready and willing to pay the said sum of the person legally entitled to receive the same. If, upon these facts, the court be of opinion that the said plaintiff is entitled in law to receive the said sum, then judgment to be entered in favor of the plaintiff, as

against the corporation defendant, in the amount of \$1,000, with interest from the twenty-fourth day of July, 1884; but if the court should be of opinion that the said plaintiff is not entitled to receive said sum, and that the said Caroline Maneely is entitled to receive same, then judgment to be entered in favor of the said Caroline Maneely against the corporation defendant, for the said sum, with interest as aforesaid.

The court entered judgment for the defendant on the ground that under the charter the widow and orphans were entitled to the benefits as against the assignee of deceased members, and that, as the widow was not a party to the suit, judgment could not be entered for her, whereupon plaintiff took this writ.

ELLIS AMES BALLARD and RUFUS E. SHAPLEY, *for Plaintiff in Error*.

A member of the Knights of Birmingham may by a designation, under the constitution, of one not the widow, deprive the latter of the death-benefit which would otherwise belong to her: *Supplee vs. Knights of Birmingham*, 18 Wkly. Notes Cas., 280.

JOHN S. MCKINLAY, *for Defendant in Error*.

We submit that some provision should be made, in disposing of this suit, to carry out, if possible, the intent of the parties to the case stated, so as to free us from embarrassment of further litigation.

GREEN, J.

It is not, and of course cannot be, questioned that under the nineteenth article of the defendant's constitution, the contract in question in this case imposed a legal obligation upon the defendant to pay the money in controversy to the present plaintiff. The contract was made and performed by the deceased and this plaintiff in strict conformity with all the requirements of the constitution and by-laws of the defendant, and the defendant is willing to pay the money called for by the contract, but wishes to be protected against a possible wrong payment, and for that purpose only makes defense. The learned court below was of opinion that there was a fatal conflict between the charter and the constitution in respect of the persons who may receive benefits from the defendant company, and for that reason alone refused judgment to the plaintiff. The second section of the charter upon which this conclusion is based is in the following words: "The purposes of this corporation shall be the maintenance of a society for the purpose of benefiting and aiding the widows and orphans of deceased members."

Construing these words, the learned court below held not within the power of the defendant to stipulate for of the benefits to any person other than the widow and might be designated as the recipient by the deceased 19 of the constitution. We think this is too narrow a view to take of the second section of the charter of While it is true that the general purpose of the corporation stated to be the maintenance of a society for benefitting widows and orphans of deceased members, it must be that this is only the statement of a general purpose. It is not a statement of an object sought to be accomplished, and which is accomplished in the great majority of cases, even though in exceptional cases the benefits may, by special contract, be given to persons other than the widow or orphans. There is no prohibitive language excluding from the powers of the corporation the right to contract specially with the member for the payment of the benefits to other persons than his widow or orphans. Nor is such a contract to be held void by reason of any necessary implication from the language of the charter; for the widow and orphans are the persons benefited, and in many ways, by a contract designating the member as beneficiary; as, for instance, if the member, in his lifetime, is endeavoring to establish a home for his wife and children, he might borrow money for that purpose, and so use it, and to secure the loan designate the lender as the beneficiary of his membership. Certainly his widow and orphans would be most materially benefited by such an arrangement. If, in borrowing a home, he met with disaster, and was about to lose the property in a judicial sale, and should have retained it by a similar arrangement, his widow and orphans would be thereby benefited. Or if he had property and also debts, but not to the point of insolvency, he might borrow money by means of a membership with such an arrangement, and he should become a member for that very purpose, and possibly also paying the dues, and he could to that extent discharge his indebtedness during his life, and thus leave that property to his widow and orphans, undoubtedly thereby benefited. Or he might borrow the money, and use it directly to his wife or children during his life, pledging his membership to the lender as above, and then also they would have the full advantage of the transaction without waiting until his death. Many more illustrations of a similar character might be suggested, but it is unnecessary. They all prove the same

to wit: That it is entirely possible to benefit the widow or orphans by means of such a membership, though neither of them is the designated beneficiary, and hence there is no necessary conflict between the second section of the charter and the nineteenth article of the constitution. But, again, the member may be unmarried, or he may have become a widower, and without children during his life, though at the time his membership commenced he may have had both a wife and children. Surely, in such a case, it would not be contended that the company would resist payment if the action were brought by an administrator, even though the money was needed only for the payment of debts, or if brought by a designated beneficiary who had loaned money on the faith of the membership.

Further discussion does not seem to be required. We are of opinion the plaintiff is entitled to judgment on the case stated. Judgment reversed, and judgment is now entered in favor of the plaintiff, and against the defendant, for the sum of \$1,000, with interest from the twenty-fourth day of July, A. D. 1884, and costs.

SUPREME COURT OF MICHIGAN.

CLEAVER

vs.

TRADERS' INS. CO.*)

A company has the right to limit in any way the power of its agents and make such limitation a part of the contract with the insured.

Where the policy provided that it should be void in case of other insurance without consent, and that the agent had no power to waive or modify any of its provisions nor to revive the contract in case it became void by a breach of any conditions, a representation of the agent that it will be all right will not avoid a forfeiture when other insurance is procured without the required consent.

T. W. ATWOOD, *for Plaintiff.*

NORRIS & UHL, *for Defendant and Appellants.*

MORSE, J.

The plaintiff brought suit to recover the amount of a policy of insurance issued by the defendant. The policy was issued on the ninth day of February, 1884, and expired February 9, 1885. The property covered by the policy was destroyed by fire, December 27, 1884. Proofs of loss were furnished, about which no question is made. November 14, 1884, additional insurance was placed on the property covered by defendant's policy, in the sum of \$2,000, in the Michigan Millers' Mutual Fire Insurance Company of Lansing, Michigan. The policy in suit provides that, if the insured shall procure any other or further insurance upon the property insured, without the consent of the company written upon the policy, the policy shall become void. The consent of the company to the taking

* Decision rendered, April 21, 1887.

of the additional insurance in the Lansing Company was not indorsed upon the policy.

Upon the trial in the circuit court for the county of Tuscola, the circuit judge directed a verdict for the plaintiff in the sum of \$2,797.16. This direction is assigned as error.

After the argument of counsel in the court below, it is stated in the bill of exceptions that the counsel for defendant "consented, for the purpose of raising the said questions as to the validity of such clauses, that plaintiff's (Cleaver's) testimony be regarded as correct."

The clauses referred to were the one already noticed, as to the taking of additional insurance, and the following: "It is further understood, and made part of the contract, that the agent of this company has no authority to waive, modify, or strike from the policy any of its printed conditions, * * * nor, in case this policy shall become void by reason of the violation of any of its conditions, * * * has the agent power to revive the same. And it is hereby mutually understood and agreed, by and between this company and the assured, that this policy is made and accepted upon and with reference to the foregoing terms and conditions, all of which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for in writing."

The plaintiff claims that because of the action of defendant's agent, Mr. Quinn, with reference to his procuring the additional insurance, the defendant is estopped from setting up the defense of additional insurance in this case. The substance of the plaintiff's testimony in regard to Quinn's action in the premises is this: When an application was sent by the Lansing Company to him to be filled out, he took it to Quinn, and told him that he was calculating to take out \$2,000 insurance in that company, and asked him if it would be all right with Quinn's company, and Quinn said it would, the property being amply worth the amount of both insurances; and thereupon Quinn helped him fill out the application, and Cleaver sent it on to Lansing. Quinn also looked at his books, and said the insurance was not yet out in his company, and asked Cleaver if he calculated to drop it; and Cleaver answered, "No;" and told him that he would make arrangements to have another policy issued when that expired. Quinn also asked him why, if he was going to take more insurance, he did not take it in the defendant company, and

Cleaver replied that he could get it for a less per cent in the Lansing Company. After plaintiff received his policy in the Lansing Company, he informed Quinn that he had procured the same. Quinn replied, "All right," and passed on, without any further conversation. Cleaver also states that he obtained the additional insurance, relying upon the statement of Quinn that it would make no difference with his insurance in the defendant's company. It also appeared that Quinn was an attorney at law, and before this had done some legal business for Cleaver. Plaintiff, however, denies that, in this instance, he went to Quinn as a lawyer to get advice and assistance in filling out the application. He testifies he called upon him to talk with him about the getting of additional insurance, and because he did not wish to put such additional insurance upon the property unless it would be satisfactory to the defendant company.

The counsel for defendant contend that this case is not governed by *Westchester Fire Ins. Co. vs. Earle* (33 Mich., 143), because of the clause in the policy providing that the agent of the company "has no authority to waive, modify, or strike from the policy any of its printed conditions." It is insisted that, if the conduct of Quinn is held to operate as a waiver, a new contract is constructed for the parties by judicial creation, in direct antagonism to the express agreement of the insured and insurer in the policy of insurance upon which plaintiff is seeking to recover.

In *Westchester Fire Ins. Co. vs. Earle* it is stated, in the opinion of Mr. Justice Campbell, at page 153, that "the powers of Atwater [the agent] in the present case do not appear to be restricted in any way;" and in none of the other cases decided in this court, and relied upon by plaintiff's counsel, can I find any mention of any clause in the policies prohibiting the agent from waiving this condition as to additional insurance. See *Pennsylvania Fire Ins. Co. vs. Kittle*, 39 Mich., 51; *Kitchen vs. Hartford Fire Ins. Co.*, 23 N. W. Rep., 616; *Carpenter vs. Continental Ins. Co.*, 28 N. W. Rep., 749.

It has been held by this court (*New York Cent. Ins. Co. vs. Watson*, 23 Mich., 486) that additional insurance, obtained without the written consent stipulated in the policy, rendered such policy absolutely void upon the procuring of such additional insurance; and that the first policy could not be revived by anything short of a new contract, or such conduct as, by misleading the insured to his prejudice, would operate as an estoppel.

It is claimed here that the action of the agent was the action of the company, and that such action created an estoppel. But it is not shown that the agent had any authority to indorse upon the policy the written consent to additional insurance, or to waive in any way the provisions of the policy. On the contrary, the policy delivered to the insured expressly states that such agent "has no authority to waive, modify, or strike from the policy any of its printed conditions, * * * nor, in case this policy shall become void by reason of the violation of any of its conditions, * * * has the agent power to revive the same." And it also appears by the testimony of the agent, Mr. Quinn, who was sworn as a witness on behalf of plaintiff, that he had no authority to consent to additional insurance, but, when application was made for such consent, it was his duty to notify the company, which he did not do in this case.

It is not shown that the company had any notice of the action of the agent in filling out the application for additional insurance, or his remark to Cleaver that such insurance would be all right, and make no difference with the insurance in defendant company. Nor is it claimed that the defendant received any premium for insurance, after the obtaining by plaintiff of the additional insurance, or did any act recognizing the existence or validity of the contract either before or after the fire. The case is not, therefore, ruled by *Carpenter vs. Continental Fire Ins. Co.*, 28 N. W. Rep., 749, and cases there cited.

It cannot be said, as in the case of *Kitchen vs. Hartford Fire Ins. Co.* (23 N. W. Rep., 616), that the insured relied upon the statements of the agent as authorizing him to procure the additional insurance. In that case Kitchen had a right to rely upon the representations of the agent, as there was "no evidence that any restriction upon his authority as agent was brought to the knowledge of plaintiff, or others dealing with him. But in the case at bar the plaintiff may be presumed to have had knowledge of the restrictions placed upon the agent by the terms of the policy he received, and the want of authority expressly appearing in its conditions was sufficient notice to him that he could not bind the company by a parol acquiescence in the taking of additional insurance.

If the agent, under the circumstances of this case, by filling out the application for the Lansing insurance, and saying it was all right, can estop the defendant company from raising and enforcing this defense, then the clauses prohibiting the agent from waiving the conditions of the policy, or from reviving it after it has become

null and void, are rendered entirely useless and nugatory. It cannot be successfully maintained but that the company has the right and power to restrict, as it may choose, the powers and duties of its agents, and, when the authority is expressly limited and restricted by the policy which the insured receives, there can be no good reason, either in law or equity, why such limitations and restrictions shall not be considered as known to the insured, and binding upon him. This is not a case where the insured had a right to rely upon the action of the agent, or to presume that his action was known to the company, and ratified by them, as in *Security Ins. Co. vs. Fay*, 22 Mich., 467. The policy received by Cleaver distinctly pointed out the way to procure additional insurance without voiding the first insurance, and expressly prohibited the agent from waiving or altering or modifying the process of obtaining further insurance.

The fact that the plaintiff may not have read the printed conditions of his policy, and relied, in ignorance of them, upon the implied or assumed powers of the agent, cannot help him. It was his business to know what his contract of insurance was, and there can be no difference in this respect between an insurance policy and any other contract. In the absence of any fraud in the making of the same, and none is claimed in this case, the insured must be held to knowledge of the conditions of his policy, as he would be in the case of any other contract or agreement. When the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of the company with the insured, so as to change the conditions of the policy, or to dispense with the performance of any essential requisite contained therein, either by parol or writing; and the holder of the policy is estopped, by accepting the policy, from setting up or relying upon powers in the agent in opposition to limitations and restrictions in the policy: *Meserau vs. Phoenix Mut. Life Ins. Co.*, 66 N. Y., 274; *Catoir vs. American Life Ins. & Trust Co.*, 33 N. J., 487.

The circuit judge, as the case stood in the court below, should have directed a verdict in favor of the defendant.

The judgment of the lower court is therefore reversed, and a new trial granted, with costs of this court to defendant.

The other justices concurred.

COURT OF APPEALS OF KENTUCKY.

BANE

vs.

TRAVELERS INS. CO.* }

An accident policy was issued for the term of twelve months. An order on the employer of insured was given for the premium, payable in four monthly installments, to be deducted from wages earned in January, February, March, and April. The order was not accepted by the employer, but the first two installments were paid by the employer. During the two months following the insured earned no wages, and the installments were not paid. But during the following month he had earned more than enough to pay them when an accident occurred. The policy provided that the installments should apply to successive periods of two, two, three, and five months each, and that there should be no liability for any period during which an installment should be unpaid. The company did not demand payment of the balance of the order, nor notify the insured that it was unpaid and the policy at an end, nor did it return to him the order.

Held, That these things were not required of the company, the policy ceased according to its terms upon non-payment. The employer could only have paid out of wages earned later at its peril.

Held, That there could be no recovery.

S. B. TONEY, and BROWN, HUMPHREY & DAVIE, *for Appellant*.

JAMES S. PIETLE, *for Appellee*.

HOYT, J.

The portions of the accident policy issued on the tenth day of January, 1883, by the appellee, the Travelers Insurance Company, upon the life of Patrick Bane, which are material to the consideration of this case, read thus:—

“The Travelers Insurance Company of Hartford, Conn., in consideration of the warranties made in the application for this policy, and of an order on the Texas Pacific Railway Company for the sum of twenty dollars, payable by installments in accordance with said

* Decision rendered, June 2, 1887.

order, does hereby insure Patrick Bane in the principal sum of two thousand dollars for the term of twelve months, commencing at 12 o'clock noon on the day and date of this policy; the said sum to be paid to Mark Bane, if surviving: * * * provided always, that, in the event of any claim for injury to the insured before the actual payment of the first installment under the aforesaid order, then from any amount found to be justly due by reason of said injury may be deducted the sum of all the installments called for by said order, whereupon the order shall be canceled, and the premiums for the full term of this policy receipted for as fully paid; but, if the sum found to be due under said claim shall be less than the unpaid installments covered by said order, then the sum adjudged to be due to insured shall be credited on account of the installments due or to become due under said order. It being expressly understood and agreed that the first, second, third, and fourth installments specified in the aforesaid order shall apply only to the payment of premiums for the first, second, third, and fourth insurance periods of two, two, three, and five months each, and in the order named. It is also agreed that there shall be no liability under this policy for any claim by reason of personal injuries, as aforesaid, occurring in either of the said insurance periods for which the respective installments of premiums shall not have been actually paid, except as herein provided for delay in payment of the first installment as the premium for the first insurance period. * * * If the company shall so elect, this policy may be canceled at any time, by refunding to the insured the premium paid by him, less a pro-rata part thereof for the time said policy has been in force."

This is the order referred to in the policy:—

PAYMASTER'S ORDER FOR \$20.

To the Texas Pacific Railway Company: Please pay to the Travelers Insurance Company of Hartford, Conn., or its authorized agent, the sum of twenty dollars, by installments as follows: First installment, five dollars, to be paid and deducted from my wages for the month of January, 1883; second installment, five dollars, to be paid and deducted from my wages for the month of February, 1883; third installment, five dollars, to be paid and deducted from my wages for the month of March, 1883; fourth installment, five dollars, to be paid and deducted from my wages for the month of April, 1883 —the first installment being the premium for two months, the first insurance period under a policy of insurance issued to me by said company, and bearing even date and number herewith; the second installment being the premium for two months, the second insurance period under said policy; the third installment being the premium for three months, the third insurance period

under said policy; and the fourth installment being the premium for five months, the fourth insurance period under said policy,—all in accordance with the provisions and conditions of said policy and my application for the same.

[Signed]

PATRICK BANE.

The policy was delivered to the insured, and the order to the insurance company. The insured worked for the railway company during January and February, 1883, but not during March and April following. He resumed work for it on May 1, and was killed on May 28, 1883. The order was never accepted by the railway company, but was left with it by the insurance company. The installments from the January and February wages were paid to the appellee by the railway company; but those for March and April were not paid, as the insured earned nothing during those months. On the tenth day of May, however, there was more than \$10 due him from the railway company, and at his death the sum of \$47.70. all earned during the month of May, 1883. The insurance company never demanded payment of the balance of the order of the railway company, and never notified the insured of its non-payment, or that the contract of insurance was at an end, and never returned the order to him, or offered to do so.

The insurance company contends that, by the terms of the contract, the several payments were to pay for insurance in several periods,—thus the first payment for two months, or from January 10th to March 10th; the second payment for two months, or from the last-named date to May 10th,—but that, if the third payment was not in fact made, then the insurance ceased at the end of the second period; in short, that the insurance was on the installment plan, and that the failure to pay the installment ipso facto worked an end of the contract.

The beneficiary under the policy says, however, that, by a fair construction of the contract, the period of insurance was 12 months; that in consideration of it, the insured gave the order for \$20; that the provision in it as to how it was to be paid was merely directory, and but an indication to the drawee as to how he was to re-imburse himself; and that it was an executed contract of insurance for a year. Moreover, if the order was not a bill of exchange, by reason of being payable out of a particular fund, that yet it was binding on the drawer as a common-law order, because, prima facie, it imported an indebtedness by him to the insurance company; and as it neither returned the order to him, nor notified him of its non-payment, nor that it elected, in consequence thereof, to consider the

contract at an end, there was a waiver of any forfeiture or right of forfeiture upon the part of the company, even if, under the contract, it had this right.

In considering this question, the character of accident insurance must be borne in mind, and that the policy is a peculiar one. Undoubtedly, the rights of the parties should be reciprocal. The insurance company should not be allowed to occupy such a legal attitude that it can say, in case the insured lives, "You owe this order;" but in case of his death, that "the insurance has expired by reason of its non-payment." The manifest injustice of such an advantage has led to the adoption of the rule in this State that where an insurance company has taken the personal obligation of the insured to pay a premium at a particular time, on pain of forfeiture, the right to rely upon a forfeiture is waived, by retaining the obligation after maturity, without notice to the insured of an intention to consider the policy void.

Here, however, the policy and the order constitute one contract, and there is no conflict between them. The order was to be paid in installments by the employer, out of the wages of the employee for specified months. They were not earned when the order was given, and the assignment could not operate until the insured was entitled to the money. It was not an assignment of twenty dollars to be paid out of any money that might become due to the insured, but only five dollars out of his wages for each of four specified months, during two of which he earned nothing. Undoubtedly, the drawee in the order had no right to pay the balance due upon the order out of the May wages. The assignment did not embrace them, and such payment, if made, would have been at his peril. If made, and it subsequently appeared that the insured had assigned his May wages to another party, such party could have compelled payment from the employer, because the transfer to the insurance company was of specific wages.

It therefore makes no difference that, when the second period of insurance expired, the insured had a sufficient amount of wages owing to him by the railway company for the month of May to have paid the balance of the premium, or that this continued to be the case until his death. The only real question, it seems to us, is whether the insurance company was required to return to the insured the order, and notify him that the contract of insurance was at an end, upon peril, if it did not do so, that it should operate as a continuation of the contract.

By the express terms of the contract the insurance was to cease at the end of the second period if the premium for the third period was not paid. It is evident that the parties to the contract looked alone to the wages that were expected to become due from the railway company for the payment of the premium. It is unreasonable to suppose that the credit would otherwise have been given by the insurance company. Railroad employes, as a general thing, are transitory persons, and it would be destructive of the accident insurance business as to them if by the mere giving of an order to the insurer, to be paid out of a fund to be earned by them in the future, they could compel the insurer to carry the insurance, although they should fail to work, because they might not be hunted up and the order returned.

In this instance the insured knew that he had not earned the wages which he had assigned in order to continue the policy. If he had lived, and the insurance company had attempted to collect the balance of the order out of his May wages, could he not have claimed successfully that he did not transfer them, and that he had chosen to let the policy lapse? He knew that the expected fund had not been earned; that by the express condition of the policy its continuation depended upon payment in that way. The right of election was with him, and not with the company, under such circumstances. It was his duty, if he desired to continue the policy, to have paid the installments, and his failure to do so terminated the liability of the company.

It is really a misnomer to say that the policy in this instance was forfeited by the non-payment of the premium. The insurance, by the express terms of the policy, ceased because of such non-payment. The payment of the premium was a condition precedent to the continuation of the risk, and even a court of equity will not interfere to release one from the consequences of such a failure. The order in this case, in view of the circumstances, did not bind the drawee personally, and with the cessation of the policy the entire contract was at an end.

The case of *Lyon vs. Travelers' Ins. Co.* (55 Mich., 145; 20 N. W. Rep., 829) differs from this one in the controlling circumstance that there the insured had earned the wages out of which the premium was thus to be paid, thus providing for its payment; and they were in fact owing by the employer, and subject to the control of the insured. Judgment affirmed.

UNITED STATES CIRCUIT COURT.

WESTERN DISTRICT OF TENNESSEE.

WIGGIN

vs.

KNIGHTS OF PYTHIAS.*

The practice or interpretation of its rules by a benevolent association will not alter the real meaning of the words used to express them when not ambiguous.

Where the constitution of such a society provides that a benefit-certificate is not forfeitable until payment is six months in arrears, the fact that they were customarily paid at the beginning of a term or before the six months expired will not make them demandable or due until the expiration of that term.

Suit upon certificates of life insurance in the endowment rank of the Knights of Pythias for \$3,000. Defense, that the local lodge dues, amounting to four dollars were unpaid at the time of the death of the member, and were "more than six months in arrears," whereby the insurance was forfeited under the contract, as interpreted by the rules and regulations of the order. The member had paid all the assessments for death, and was not otherwise in default except as to the lodge dues.

MILLER & GILLHAM, *for Plaintiff.*

FRATZER & SCRUGGS, *for Defendant.*

HAMMOND, J.

We need not at all consider any of the interesting questions argued in this case except that which relates to the time when the lodge "dues" become in arrears, for, in the view the court takes of

* Decision rendered June 18, 1887.

that matter, all else becomes immaterial. For the purposes of this case it may be conceded to the fullest extent that the certificate for life insurance in the endowment rank is absolutely forfeited for the non-payment of dues which are in arrears for six months; and that there is no possible escape by waiver, estoppel, or what not from that forfeiture; that the payment of assessments for the death of members after the forfeiture takes place, whether with or without knowledge on the part of the endowment rank of the delinquency for dues, does not affect the forfeiture; that no declaration of forfeiture or suspension is necessary; that good standing in the local lodge is an essential prerequisite to entitle a member to the benefits of the endowment rank; and that the courts will enforce the fraternity law in these respects, as a part of the life insurance contract. And yet the court finds the fact to be that the decedent in this case was not "more than six months in arrears for dues in his lodge" at the time of his death, and therefore had not forfeited his benefit-certificate of life insurance in the endowment rank of the defendant order, and the plaintiff is entitled to judgment for the \$3,000 and interest.

The facts are that Wiggin died on the thirteenth day of October, 1883, having paid all assessments necessary to keep his life insurance benefit in force, but leaving unpaid four dollars of dues to his local lodge; and the question is whether, under the rules and regulations of the order, they were in arrears more than six months. The constitution of the endowment rank in which the member obtains the benefits of the life insurance department of the order, provides as follows:—

Art. 11, § 1. A member shall be considered in good standing in the section as regards dues, who is not more than six months in arrears for dues to his lodge; and shall not be considered in good standing, as regards dues, when he is more than six months in arrears for dues in his lodge.

The general laws for the government of subordinate lodges in Tennessee enact as follows:—

Art. 5, § 1. Each subordinate lodge shall regulate its dues and benefits; provided, however, that a member who is one year in arrears shall stand suspended, unless he be under charges.

The by-laws of Constantine Lodge, No. 23, contain the following regulations:—

Sec. 6. Members of this lodge shall pay into the treasury thereof, as dues, the sum of \$6.00 per year, payable semi-annually, at the last-stated meetings in June and December.

Sec. 35. All members who shall refuse or neglect to pay all dues, assessments, and fines in full, at the end of each semi-annual term, shall be declared in arrears, and non-participants in any of the benefits of this lodge.

Sec. 36. The terms begin on the first days of January and July, and end on the last days of June and December.

The officer of the lodge introduced as a witness testifies that the dues were not payable in advance, but at the end of each term, and this is clearly the meaning of the rules of the lodge already quoted. Each lodge has the power to regulate that matter for itself, may make the dues payable in advance, or at the end of the period for which they are leviable; but the pay-day does not come until the time fixed for it, and they cannot, in the nature of the words used to impose the forfeiture insisted upon, be in arrears until that day is past, whatever day it be. The fact that the members may pay the dues at any time during the term, that is to say, in advance of the day fixed for obligatory payment, does not at all affect the question; nor does the fact, if it be so, that most of the members do pay before that final day of reckoning the charge, affect it; nor does the opinion of the members or of the officers of the lodge, or of the lodge itself, affect it. These words of the by-laws become part of the contract for life insurance, and in the courts, must receive the ordinary interpretation put upon the contracts containing them: *Watson vs. Jones*, 13 Wall, 679, 11 Amer. Law Reg. (N. S.), 439, and *McMurry vs. Knights of Honor*, 18 Cent. Law J., 373, and authorities cited. Nor does this principle of construction of the contract at all impinge upon the doctrine that the fraternity may make its own laws and interpret them as it will, and that these laws, so interpreted, will be enforced by the courts; nor upon the ruling in *McMurry vs. Knights of Honor* (20 Fed. Rep., 107; 18 Cent. Law J., 372), that these certificates of benefit for life insurance depend upon the rules and regulations of the order issuing them for their validity and effect. Everybody will agree to that; but these benevolent associations or fraternities, not more than other parties to contracts, cannot be allowed to construe the words they use in making agreements otherwise than according to their plain and unambiguous meaning, in the English language they employ, whether of the words of the contract itself or of the rules and regulations which become, by the principle they insist on, embodied in the contract as a part of it. They cannot be permitted to interpret the contract as they please, and become their own judges of what they mean by the use of the words employed that have either a technical or well-defined

signification, known of all men who use the language. Legislatures and parliaments cannot do that, and even they are bound by the common meaning of the words they use in their statutes which become part of a contract. But no proof here shows that this order ever gave any other interpretation to the words than that we give them here. The decisions of the supreme chancellor and the supreme lodge cited from its journals of 1881, pp. 2,290, 2,291, 2,479, 2,487, and 2,490, and from the journal of 1883, p. 2,788, only hold that death-assessments paid by a member who is more than six months in arrears for lodge-dues are irregularly collected, and should be returned, and that such assessments do not relieve the forfeiture of life insurance. The officers of Constantine Lodge, No. 23, only say that members may pay before the end of the term and do, but not that they must pay before that date. If any local lodge should wish to make the dues payable in advance, it can do so, and may fix any day of payment it chooses, but it cannot alter the plain meaning of the words "in arrears," and declare a sum owing to it to be in arrears before it is finally and absolutely demandable and payable as a matter of fixed obligation as to the time of payment; not, at least, when these words become a part of any contract the order makes, whether with a member or other person. But Constantine Lodge has not undertaken to do that, for, under its by-law No. 35, the dues are payable in express terms "at the end of each semi-annual term," and not sooner. It has no power to declare them in arrears before that time, except by changing the by-law so that the pay-day shall come at an earlier date. The member when the end of the semi-annual term is reached and is past, is, by the by-law, "declared" or deemed to be "in arrears," but the six months' grace allowed by the endowment rank begins at that time and does not end there, as has been supposed.

That this is always the fixed and technical meaning of "arrears" is too plain for argument. The oldest lexicographer of law terms known to me defines the word as coming "from the French *arriere*, retro; behind; money unpaid at the due time, as rent behind:" Cowell, *Law Dict.* h. t. To the same effect are all the dictionaries: *Jac. Dict.*; *Bouv. Law Dict.*; *Abb. Law Dict.*; *Soule, Syn.*; *Roget's Thes.*; *Webster's Dict.*; *Worcester's Dict.* The same meaning is developed if we examine the legal signification of the words "due" or "dues," and "accrued," and the like, in their relation to this idea of being "in arrears." The word "due," unlike "arrears," has more than one signification, and expresses two distinct ideas, and this dis-

tion is important in relation to its use in these rules and regulations. "At times it signifies a simple indebtedness, without reference to the time of payment. Debitum in presenti, solvendum in futuro. At other times it shows that the day of payment has passed: *Scudder vs. Coryell*, 5 N. J. Law, 340, 345. It is evidently used in the rules and regulations of this order in the first of these significations, and not at all in the second; and hence there is some confusion of ideas, perhaps, in their interpretation. But there is no such ambiguity about the word "arrears," as has been shown by its definition. The cases of *Moss vs. Gallimore* (1 Doug., 279), and *Birch vs. Wright* (1 Term R., 378), and many others in the law concerning real property, illustrate this meaning when used to express that "rent is in arrears," etc. Always, it must be past due to be "in arrears." Also the case of *Mundt vs. Sheboygan R. Co.* (31 Wis., 451), construing a statute for the protection of laborers which required that notice should be given "within thirty days after such claim or demand shall have accrued," is instructive. It was there held that a claim for wages already earned and payable, but which, by the custom of the railroad company and its laborers, were to be paid on the fifteenth day of the next month, as a pay-day, did not accrue until that pay-day arrived, and that this custom became a part of the contract.

Here the disputed dues for the term commencing January 1st, and ending June 30th, did not become finally payable until the latter date, after which only did they become "in arrears;" and, as Wiggin died before the six months' indulgence expired, his policy was not forfeited by the very terms of the contract itself. Judgment for the plaintiff.

COURT OF APPEALS OF NEW YORK.

HOLLY

vs.

METROPOLITAN LIFE INS. CO.*

The policy provided that it should be forfeited if the premiums were not paid when due; also that upon such failure to pay, upon the surrender of the policy within thirty days, a paid-up policy would be issued for the amount of the premiums paid. Being unable to pay a premium when due the insured executed a note for the amount which stipulated that if not paid at maturity all claims to further insurance should become forfeited. This note was renewed, but default was made on the renewal and ten days thereafter the amount due was tendered and refused.

Held, That the policy had been wholly forfeited and the insured was not entitled to a paid-up policy.

WM. H. ARNOUX, *for Appellant*.

JAMES M. FISKE, *for Respondent*.

PECKHAM, J.

The defendant insured the life of the plaintiff, August 16, 1870, in the sum of \$5,000, on payment of a premium of \$247, and a premium of the same amount thereafter, payable on the sixteenth of August in each year. The policy was issued for the sole benefit of Charles F. Holly, Jr., and contained a clause of forfeiture if the premium were not paid at the time mentioned. It also contained a promise that if, after three annual payments of premiums were made, the assured should fail to make payment of any further premium when due, then, upon a surrender of the policy within thirty days after such unpaid premium should be due, the company would, in ex-

* Decision rendered, April 19, 1887.

change, issue a paid-up policy for the amount of even dollars of premium received by it on the policy. The plaintiff had thirty days after a premium became due in which to pay it. By subsequent agreement, the payment of the premium was changed from annual to semi-annual periods, and as thus changed the premiums had been paid to February 16, 1877. The plaintiff did not pay the premium which became due on the date last named, and had not paid it on the fourteenth of March following. On that day he called at the office of the company in New York, and being, as he says, short of money, he asked for an extension of time, which resulted finally in his giving a note for the payment of the premium which had fallen due on the sixteenth of the previous February, and the note was payable in three months from its date (March 14), and contained this condition: "This note is given in part payment of the annual premium on policy numbered as per margin, with the understanding that all claims to further insurance, and all benefits whatever which full payment in cash of said premium would have secured, shall become immediately void and be forfeited to said company if this note is not paid at maturity." Contemporaneously with this note, and as part of one and the same transaction, the defendant gave to the plaintiff the following receipt:—

METROPOLITAN LIFE INSURANCE CO.

319 BROADWAY, NEW YORK, March 14, 1877.

Note 3 mo. due June 14, 1877. Chas. F. Holly.

Received from the owner of policy No. 9,609, \$128 45-100, which continues said policy in force until the sixteenth day of August, 1877, at noon, in accordance with its terms and conditions. Not binding upon the company until the premium is paid, and this receipt signed by

JNO. R. HEGEMAN,
(Prem. Receipt)
Vice-President.

When this note became due, the plaintiff, not desiring to pay it, asked for its renewal and the result was that the plaintiff signed another note, containing a condition precisely similar to that set forth in the first one, payable August 14, 1877, and the defendant gave up the first note to the plaintiff. When the second note became due, the plaintiff failed to pay it, and on the twenty-fifth or twenty-sixth of August thereafter called at the office of the company, and offered to pay the note, which payment was refused, and the claim made that the policy was forfeited by the non-payment of the note when due. The plaintiff subsequently commenced this action to compel defendant to comply with its agreement, and give

a paid-up policy for the amount of premiums paid by him (over \$1,700) up to the time when he failed to pay the premium due August 16, 1877.

The plaintiff has succeeded thus far. In the argument of the case here for the plaintiff much stress was laid upon the rules governing the court in construing contracts between insurance companies and policy-holders, especially when any forfeiture is to be insisted upon by the former. A strict construction, it is said, must be insisted upon, and the contract resulting in a forfeiture cannot be extended beyond the strict and literal meaning of the words used. This is undoubtedly true. In cases where the meaning is not entirely plain, and where it is capable of two constructions, one involving a forfeiture and the other being fair and reasonable, and supporting the obligation of the policy against the insurer, that construction is preferred by the courts which does not involve the forfeiture, not only because it is not so harsh, but also because, if the language be doubtful, it is that employed by the insurer, and should be taken most strongly against him. As is said by Finch, J., in delivering the opinion of this court: "If a construction so literal and severe is intended by the insurer, he should at least say so by plain and appropriate language, and not ask the court to supply it by intendment." See *Burleigh vs. Fire Ins. Co.*, 90 N. Y., 220. This was said in relation to the construction to be given the words "detached at least one hundred feet" in a policy of insurance upon a lot of goods in a frame store-house thus situated. The court held that a small office standing 75 feet away, which the trial court found was not an exposure, and did not affect the risk, did not constitute a breach of the warranty. But all the cases which use language of this nature as to the construction to be given words in a policy are cases where the words used leave the meaning in doubt. Where there is no doubt as to the meaning of the language used, such meaning must prevail with courts, for the simple reason that the parties have so contracted; and, in the absence of fraud or mistake, both must live up to their contracts, or take the consequences.

We entertain no doubt as to the meaning of this contract. On the sixteenth of February, 1877, a semi-annual payment of a premium became due from the plaintiff, which he was obliged to pay in order to keep his policy alive, or he could have made default in payment, and demanded his paid-up policy for the proper amount. He had thirty days from the sixteenth of February in which to pay the premium due that day, or to make his demand for a paid-up

policy. He waited until the fourteenth of March before doing anything, and he went to the office of the defendant in New York for a favor; i. e., the postponement of the cash payment at that time. This favor the company granted, but only upon condition, which was put in writing and assented to and signed by the plaintiff. He thereby consented and agreed that, if he failed to pay this note at maturity, he should thereby, among other things, immediately forfeit all claims to further insurance.

The written receipt is to be read in connection with the whole transaction then appears to be and it was so. The company acknowledged the receipt of the February 14th, 1877, and continued the policy in force to August 16th, providing that if the note was not paid at maturity, which was given instead of cash in payment of the premium, it should immediately forfeit the policy, and all claims to further insurance. The right of forfeiture includes the very claim in suit. When the note became due, it was renewed by the execution of a new note on the same terms and conditions, due August 14th, and this note was then surrendered. By failing to pay this last note at maturity, the forfeiture provided for therein immediately attached. The plaintiff thereby lost the right which he would otherwise have had to further insurance according to the tenor of his policy. He had agreed to give up on condition of obtaining an extension of time in which to pay his premium, and by failing to do so at the end of that time.

It is argued that taking the first note had the effect of creating a new period from which the default in payment of the premium should afterwards be measured; and that as the premium became due, under the final arrangement, on the 14th of August, 1877, the plaintiff, by the policy, had the right to surrender the policy within thirty days after that time. This reasoning ignores the condition contained in the note, and renders the language thereof meaningless. The note not only extended the time for payment of the premium, but it distinctly stated, not to be paid at maturity should be treated as a default, which would give the thirty days thereafter in which to surrender the policy. It demanded a paid-up one, but the language used was entire and free from doubt, making an unambiguous agreement that the plaintiff would absolutely and immediately forfeit all right to further insurance if the note were not paid at maturity. To that extent it was a condition of the terms of the policy giving 30 days after a default

surrender and make a demand, and instead thereof it plainly provided for a total and immediate forfeiture if at maturity the note were not paid. If language as plain and unambiguous as this is not only to be twisted out of its natural meaning, but is to be wholly ignored by courts of justice, it will be useless in the future for companies to make any effort to bind policy-holders to perform their contracts. The use of language is to express ideas, and writing is resorted to in order to furnish conclusive proof of what language was used. Being certain of the language used, and the case being free from fraud or mistake, if such language is plain and susceptible of but one meaning, that meaning, even in cases of contracts regarding life insurance, must control, though a forfeiture should be the result.

Punctuality in the payment of premiums in the case of a life insurance policy is of the very essence of the contract; and, when payment is not made at the time, the company has the right to forfeit if such were the contract: *Attorney-General vs. North America Life Ins. Co.*, 82 N. Y., 172-189; *People vs. Knickerbocker Life Ins. Co.*, 103 N. Y., 408; *Insurance Co. vs. Statham*, 93 U. S., 24. Here the plaintiff failed to pay his premium on the sixteenth of February, and was accorded the favor of a postponement until the maturity of the first note in June, and then, on his failure, the company legally exercised its right of forfeiture. No stress is laid, and upon the evidence none can be laid, upon any alleged promise to renew or extend the payment of the second note. By plaintiff's own evidence there was no such promise.

The judgment must be reversed, and a new trial granted; costs to abide event. All concur.

SUPREME COURT OF CALIFORNIA.

CARROLL

vs.

GIRARD FIRE INS. CO.* }

Where the company joins in an arbitration and sets up the award as a defense, it thereby waives the policy-provisions regarding proofs of loss, even though the policy stipulates that no provision therein shall be waived except by written indorsement.

The policy provided that no suit should be sustainable until after an award had been obtained.

Held, That a complaint which neither alleges an award nor an excuse for not obtaining it, is fatally defective.

T. C. VAN NESS, *for Appellant*.

WIGGINTON, CREED & HAWES, *for Respondent*.

HAYNE, C.

Action upon a policy of insurance. Verdict and judgment for plaintiff. The grounds for reversal urged by counsel for appellant may be reduced to two.

1. The policy requires that in case of loss the assured shall "forthwith" give notice thereof, "and shall also produce" a certificate from a notary or magistrate to the effect that he has examined into the circumstances, and believes that the assured has sustained the loss without fraud on his part. These things were not done. But the evidence shows that when the claim was brought to the attention of the company, it made no objection on account of the absence of the notice and preliminary proof, but went on and joined in proceedings for determining the amount of the loss by arbitra-

* Decision rendered, May 20, 1887.

tion. These proceedings were required by the policy to be taken to determine the amount of the loss, "after proof thereof has been received in due form." They culminated in an award fixing the loss at a certain sum. The first we hear of an objection on ground of want of notice and preliminary proof is in the answer filed by the company in the action; and by this time the period for giving the notice and making the proof had certainly expired. We think that under these circumstances the formalities mentioned must be considered waived. By joining in the proceedings to fix the amount of the loss, the company manifested its intention to dispense with preliminary formalities. The assured had a right to rely upon this manifestation of intention. And to say that the company all along intended to require the notice and preliminary proof, and to take advantage of their absence after the time for giving them had expired, is to impute to it a want of good faith and fair dealing which we will not assume.

The counsel for appellant urges several reasons against this conclusion, viz:—

(a) That those who acted for the company had no authority to waive, any condition of the policy. But the company does not repudiate the acts of those who acted for it in this regard. On the contrary it adopts them, and shelters itself behind the award, which was the result of such acts. It is plain that it cannot do this without accepting all the consequences of the acts.

(b) It is said that the submission to arbitration provides that "this appointment is without reference to any question or matters of difference within the terms and conditions of the insurance, and is not to be taken as any waiver upon the part of said companies of the said conditions in their policies in case they elect to avail themselves of them." If this means the right to object on account of the absence of preliminary steps was to be reserved until after the time for taking them had expired, it certainly is a very crafty document. But we do not think such is its meaning. The proceedings for fixing the loss were, as we have seen, not to be commenced until after the preliminary steps had been taken. And the language of the submission is that the appointment is to be without reference to "any other question within the terms and conditions," etc.; and the proviso is that it "is not to be taken as any waiver of said conditions." We think that, taking all the circumstances into consideration, it is a fair construction to hold that the proviso as to waiver refers to the conditions other than the ones relating to the appointment of the

arbitrators, and those superseded or waived thereby. But, however this may be, the language of the proviso relates only to the effect of the "appointment" of the arbitrators, and does not extend to subsequent proceedings. And by going on and completing the award, and setting it up as a defense, the company waived the preliminary steps under the principle first above laid down.

(c) It is urged that the policy provides that no "condition, stipulation, covenant, or clause hereinbefore contained shall be altered, annulled, or waived, * * * except by writing indorsed hereon, or annexed hereto, by the president or secretary, with their signatures affixed thereto." But this condition is of no more sanctity than any other conditions of the policy. Like any other provision for the benefit of the company, it could be waived; and we think that, so far as the notice and certificate are concerned, it was waived by the submission to arbitration, and the subsequent proceedings. We are of opinion, therefore, that the defense founded upon the want of notice and certificate is of no validity.

2. The defendant set up the award of the arbitrators determining the amount of the loss; and we think that its position in this regard must be sustained. The policy provides that "in case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter may at the written request of either party, be submitted to competent and disinterested appraisers,—one to be appointed by the assured, and one by the company, and these two shall select a third if necessary,—whose award by them or any two of them in writing, shall determine the amount of such loss or damage, but not decide the question of the liability of this company under this policy," and that "no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until an award shall have been obtained fixing the amount of such claim in the manner hereinafore provided."

A similar provision was held to be valid, and to be a condition precedent to any right of action, in *Old Saucelito L. & D. D. Co. vs. Commercial U. A. Co.* (66 Cal., 253), and this case was approved and followed in *Adams vs. South British Ins. Co.*, 11 Pac. Rep., 627. It is argued for the respondent that these cases are not in point, for the reason that the policies there considered contained express provisions that the determination of the arbitrators should be "binding on both parties." But we are unable to assent to this view. The provisions of the policy under consideration seem to us to be sub-

stantially the same as those in the cases mentioned, and to be to the effect that the amount of the loss shall be first determined in the manner specified, and that the action must be for the amount as fixed. And it is no more open to the respondent, after submitting to the arbitration, to say that as a matter of fact, no "differences" existed, than it would be for the appellant if it had been dissatisfied with the award, to say that no "written" request for arbitration had been made.

The logical result of this view is that the award is a necessary element of the plaintiff's cause of action. In contemplation of law the promise is not to pay such damage as the insured should suffer, but to pay such sum as the arbitrators should fix as the amount of damage sustained. It follows that the action should have been for the amount of the award, and that the award should have been set forth in the complaint. See *Morse, Arb.*, 95. The allegation that "all the conditions of said policy of insurance were duly performed and kept by this plaintiff" is not equivalent to setting forth the award, because, as has been stated, the award is a necessary element of the cause of action, and it is not the action of plaintiff, but of third persons. If a fair award was prevented by the fraudulent conduct of defendant, the complaint should have set forth the acts constituting the fraud. But the complaint, although it set out the policy, thereby disclosing the provisions as to the award, made no mention of any award having been made, or of any reason why not. Hence it did not state a cause of action, and the demurrer should have been sustained. This not having been done, the defendant's objection to any evidence impeaching the award set up in the answer should have been allowed.

It would not help the plaintiff's case to show that, by reason of any irregularity of the arbitrators, such as want of hearing, or the like, the award was void; for, if the defendant could not be charged with participation therein, the result would simply be that the action was prematurely brought.

The document filed by plaintiff, styled "Answer to defendant's cross-complaint," must be ignored, because the defendant filed no cross-complaint. The attempted pleading was therefore wholly unauthorized; but, even if it could have any effect as an answer to a cross-complaint, it could not obviate the defects in the complaint,—it being thoroughly well settled that, in order to support a judgment, the complaint must state a cause of action.

For these reasons we advise that the judgment and order be reversed, with directions to sustain the demurrer to the complaint, with leave to plaintiff to amend.

We concur : Belcher, C. C.; Foote, C.

By THE COURT.—For the reasons given in the foregoing opinion the judgment and order are reversed, with direction to sustain the demurrer to the complaint, with leave to plaintiff to amend.

SUPREME COURT OF INDIANA.

Appeal from Marion County Superior Court.

JANE KLINE

vs.

NATIONAL BENEFIT ASSOCIATION
OF INDIANAPOLIS.*

The policy provided that it should be incontestable except for fraud on certain conditions which were complied with. The insured gave an order for part payment of premium, which was not honored. The order stipulated that if not paid all rights of the insured in the policy should be forfeited.

Held, That as to the beneficiary, no forfeiture could be enforced. The policy provided that the binding receipt when its number has been inserted in the policy shall be conclusive evidence of payment of premium, and when such an instrument with the number inserted is placed in the hands of the beneficiary, the company will be estopped to assert as to her the non-payment of premium.

ELLIOTT, C. J.

The policy of insurance on which this action is based contains, among others, this provision: "This certificate shall be incontestable for any cause except fraud or misrepresentation in the application or proofs of loss, or failure to report to the association any change of occupation that would make the risk a more hazardous one, or failure to comply with the conditions above specified." The policy also recites that an admission-fee of eight dollars has been paid, and that six advance assessments amounting to nine dollars and sixty cents had been paid to the association. In the application is written: "I hereby agree to pay on becoming a member, the following : Ad-

* Opinion filed, April 26, 1887.

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mission-fee, \$8.00; dues, \$—; assessments of \$1.60 each, \$9.60; total \$17.60.

“I have received for the above binding receipt No. 6,337.

“N. B.—If the number of a binding receipt is inserted, it becomes conclusive evidence that the above amount has been paid; if no number of a binding receipt is inserted, the payment is to be made upon the delivery of the certificate.”

The number of the binding receipt, as it is called, was inserted in the policy. The assured did not make full payment in money, but as payment of part of the consideration of the contract, gave two orders, reading substantially as follows :—

\$5.60

INDIANAPOLIS, July 24, 1882, No. —.

Please pay the National Benefit Association, 66 East Market Street, Indianapolis, Indiana, \$5.60 out of my wages for the month of August, 1882, to be applied as follows: Admission-fee, \$4.00; expense-fee and assessments, \$1.60. If this order is not paid, then all my rights in said association are thereby forfeited. I hereby authorize said association to deduct from moneys due on account of injuries any indebtedness there may be against my certificate.

(Signed) NICK KLINE.

Payment of these orders was refused because Kline notified the railroad company upon whom they were drawn, not to pay them. The policy was taken out for the benefit of the appellant, the mother of the assured, and he was accidentally killed within one hundred days after the policy was issued.

There was no error in admitting both of the orders in evidence, although only one was pleaded in the appellee's answer. This is so because the general denial pleaded enabled the appellee to give evidence contradicting that of the appellant upon the question whether or not the assured had performed the conditions of the contract on his part: *National Benefit Association vs. Bowman*, decided April 9, 1887.

The language of the application and of the policy, declaring that the policy shall be incontestable except for fraud, is unusually strong and clear. It is declared that if a binding receipt is issued, and its number inserted in the policy, the policy “shall be incontestable.” It seems clear that having made this express and strong statement, the association cannot be allowed to affirm as against the beneficiary, however it may be as to the assured, that the conditions precedent to the validity of the policy were not performed. The case of *Wood vs. Dwaris* (11 Exch., 493) is a much stronger one in favor of the insurer than the present. In that case the policy itself

contained an express stipulation that, if any untrue statements were made, it should be void; but in a prospectus issued by the company it was provided that all policies should be indisputable except in case of fraud; and it was held that notwithstanding the provision in the policy the insurer could only avoid the policy for fraud. In the course of the opinion delivered in that case, Baron Alderson said: "When the plaintiff went to their office the defendants professed to grant him an assurance on those terms. Therefore they cannot now set up as a defense that the statement in the proposal was untrue, unless they add that it was fraudulently untrue, for they have in fact said that they will never make any other defense." This case was approved in *Wright vs. Mut. Ben. Ass'n*, 43 Hun, 61; 35 Alb. Law Jour., 323. In *Whelton vs. Hardesty* (8 El. & Bl., 232, p 276) it was said by Lord Campbell: "According to the case of *Wood vs. Dwarries* (11 Exch., 493), the equitable replication would be sufficient without the special fraud thus imputable to the fourth plea, and we ought to be bound by that decision, even if we doubted the propriety of it, but I must say that I heartily concur in it." There are other cases which recognize the general principle which applies here: *Wonter vs. Shairp*, 4 Man., G. & S., 408; *Watson vs. Earl of Charlemont*, 12 Adol. & E. (N. S.), 863; *Horwitz vs. Equitable Ins. Co.*, 40 Mo., 557; *Steele vs. St. Louis etc. Co.*, 3 Mo. App., 207.

Whether the assured could have availed himself of the benefit of that part of the policy which stipulates for the payment to him of weekly benefits in case of an accidental injury, we need not decide; for here the claim is made by the beneficiary to whom the association agreed to pay \$1,000 in the event of the death of the assured. The beneficiary took an immediate interest in the policy, and her rights could not be impaired by any act of the assured performed subsequent to the execution of the policy, for the contract is that of an ordinary insurance company, and not that of a benevolent organization: *Supreme Lodge vs. Schmidt*, 98 Ind., 374; *Damron vs. Pennsylvania etc. Co.*, 99 Ind., 478; *Harley vs. Heist*, 86 Ind., 196; *Wilburn vs. Wilburn*, 83 Ind., 55; *Pence vs. Makepeace*, 65 Ind., 345. The act of Kline in securing a refusal to pay the orders might perhaps have precluded him from recovering under the policy, but it cannot prejudice the rights of the appellant. The case, therefore, is not affected by the wrongful act of the assured in securing the refusal to pay his orders, but it is to be determined upon the legal effect of the original contract between the insurer and the assured.

There is a valid reason for making a distinction between of the assured and the beneficiary in such a case as Here the application indorsed on the policy provided a "binding receipt," when its number is inserted in the policy, is conclusive evidence that the above amount has been paid. The policy itself declares that it shall be incontestable except in fraud, and when these instruments are placed in the hands of the beneficiary, as in this case, the insurer ought on plain principle to be estopped to assert that the premium due under the policy had not been paid. It is difficult to perceive how such representations could be made; and to permit the insurer to do them would in many cases be unjust, for it might well be that the beneficiary, if not misled, would pay the premium. Some authorities go so far as to hold that upon grounds of public policy an insurance company will be held estopped to deny as a matter of knowledge, that the consideration for the policy has been paid. *Teutonia Life Ins. Co. vs. Anderson*, 77 Ill., 384.

It is held by many courts, including our own, that when a promissory note is taken in payment of the premium, the payment of the note will not forfeit the policy, although it is so stipulated in the note: *Franklin Life Ins. Co. vs. Wallace*, 93 Ind., 7; *Little vs. Co.*, 56 Ind., 504; *Hull vs. Northwestern Ins. Co.*, 397; *Phoenix Ins. Co. vs. Doster*, 106 U. S., 30, 18; *Insurance Co. vs. Dutcher*, 95 U. S., 269; *Ohde vs. Insurance Co.*, 40 Iowa, 357; *Insurance Co. vs. Bonner*, 36 Iowa, 18. In the case of the *National Benefit Association vs. Jackson*, 414, it was held in an action on a policy like the one in this case, that the order was a payment of the premium, although the insurer was unable to collect it. Our conclusion is that the insurer is estopped as against the beneficiary, to aver that the sum paid in the binding receipts, and acknowledged in the policy, were not paid.

But if it were granted that there was no estoppel, the judgment must be reversed, because the contract does not require the appellee to declare a forfeiture for non-payment of the premium received from the assured. Taking into consideration the contract as evidenced by all the written instruments, there is no cause for forfeiting the policy. The only clause which gives a right to declare a forfeiture is the brief clause in the order given by the assured, and this cannot be availed against the statement in the application, the acknowledgment

in the policy, the provision that it shall be incontestable except for fraud, and the recitals of the binding receipt. The clause in the order which reads thus : "I hereby authorize the association to deduct from moneys due on account of injuries any indebtedness there may be due on my certificate," is inconsistent with the theory that the existence of an indebtedness forfeited the policy. At all events they are not such strong and clear words as require the court to adjudge that the insurer had a right to declare the policy forfeited : *Northwestern etc. Co. vs. Hazlett*, 105 Ind., 213; *Franklin etc. Co. vs. Wallace*, 93 Ind., 7; *Northwestern etc. Co. vs. Little*, 56 Ind., 504.

The judgment is reversed, with instructions to award the appellant a new trial, and for further proceedings in accordance with this opinion.

SUPREME COURT OF IOWA.

BENNETT

vs.

COUNCIL BLUFFS INS. CO.*)

Where, under direction of the agent, a clerk of the latter solicits the application, and the agent issues a policy thereon, and a statute provides that any person soliciting insurance or procuring applications shall be held to be the agent of the company, the latter is bound by a knowledge of other insurance, communicated to the clerk by the insured, though not communicated to the company.

Evidence of a right on the part of the clerk to apply the premium to his personal indebtedness to the insured, is evidence of his right to collect it.

Where the insured in case of such other insurance was in doubt from which company she could recover, she had a right to claim from both if done in good faith.

SAPP & PUSEY, and HENDERSON, HURD & DANIELS, *for Appellant.*

UTT BROS., *for Appellee.*

SEEVERS, J.

The defendant pleaded that there was other insurance on the property destroyed, of which the defendant did not have notice, and that this fact rendered the policy void. The fact that there was such insurance is conceded. The facts are that George Salot was the defendant's agent, and that he had the authority to issue policies, and enter into contracts of insurance. Salot had in his employ a clerk who was boarding with the plaintiff. This clerk was directed by Salot to solicit the plaintiff to insure her property in the defendant's company, and, if she did so, the clerk was to have the commission to apply on his board. The clerk procured the plaintiff to sign an application, which was delivered to Salot, and he issued the pol-

* Decision rendered, March 3, 1887.

icy. The application was not sent to the defendant, and at the trial it could not be found. The foregoing facts are not controverted. As the plaintiff claims, at the time or times the clerk was soliciting the plaintiff to insure in the defendant's company, he was informed that the property was insured in another company which was insolvent, and there was evidence tending to so prove. The material question is whether the defendant is bound by the knowledge of the clerk.

1. The appellant insists that Salot, as the defendant's agent in issuing policies and making contracts of insurance, was vested with large discretionary power, involving a knowledge of insurance, and the exercise of judgment in determining upon risks, and that he could not delegate such powers to another. It will be assumed, in the absence of a statute, that the weight of authority sustains the foregoing proposition. For the purposes of the case, therefore, it will be conceded. But it will be observed that Salot did pass upon the risk as stated in the application, and that he did not delegate his authority in this respect. The question, therefore, is whether he had the power to have his clerk solicit insurance, and whether the plaintiff had the right to assume that he for that purpose was the defendant's agent.

It is provided by a statute that "any person who shall hereafter solicit insurance, or procure applications therefor, shall be held to be the soliciting agent of the insurance company issuing the policy."—Muller's Code, 1880, p. 299. Counsel insist that this statute cannot be construed as contemplating a person who wrongfully obtains a blank application, and, without the knowledge of the company, solicits insurance, fills up the blanks in the application, and procures it to be signed by a person desiring insurance. Clearly not, if this is all that is done. But suppose the application, so filled up and signed, is presented to the company, and it issues a policy thereon, and receives the premium. Is it not bound thereby, even if it does not know who procured the application? We think a policy so issued would be a valid contract of insurance. If material, the company was bound to know who the agent was, and, without doubt, could be compelled to pay the loss if one occurred. The statute should be construed, we think, as embracing any case where a policy has been issued upon an application; and whoever procures such application must be regarded as the soliciting agent of the company issuing the policy. It will probably be conceded that if the defendant had sent a clerk employed in its office to solicit insurance, and he had done

what Salot's clerk did, and the policy had issued, that the defendant would have been bound. Now, we are unable to see any material difference between that case and the one at bar, except that in this case the defendant did not know Salot's clerk, or that he had procured the application. But Salot did, and he issued the policy, as he was authorized to do. The defendant is bound by what Salot knew and what he did; for, as to the plaintiff, the defendant stands in the shoes of Salot. The policy was issued by the latter, but it was the act of the defendant, and, under the statute, the defendant was bound to know who procured the application, for the reason that Salot had such knowledge when he issued the policy. The policy, therefore, is not void because there was other insurance on the property destroyed, if Salot's clerk had knowledge of such insurance, as claimed by the plaintiff, provided he was such an agent as knowledge to him would be binding on the defendant. The defendant insists he was not such agent.

2. Under the evidence the jury would be warranted in finding that Salot's clerk had full knowledge that there was other insurance on the same property at the time he procured the application, and when the policy was issued; but there is no evidence tending to show that he so informed Salot. The evidence tends to show, and the jury would be warranted in finding that Salot's clerk had the power and authority to solicit this insurance, procure the application, collect the premium, and deliver policy. The only doubt is as to the collection of the premium. As to this the evidence is undisputed that he had the right to have it applied on his indebtedness due the plaintiff. This is sufficient to show he was authorized to collect it. The defendant, therefore, is bound by the knowledge obtained by such clerk as to the prior insurance, and must be deemed to have waived the condition of the policy in this respect: *Boetcher vs. Hawkeye Ins. Co.*, 47 Iowa, 253; *Jordan vs. State Ins. Co.*, 64 Iowa, 216, 19 N. W. Rep., 917.

3. It is insisted the verdict is not sustained by the evidence, and that the amount recovered is excessive. We cannot interfere with the verdict in either respect, without infringing upon the well-established rule of this court. When the loss occurred, the plaintiff made proofs of loss to the other insurance company, and also to the defendant. She claimed of each company the entire amount of the loss, and it is insisted that this constitutes such a fraud, or attempt to defraud, as, under the terms of the policy, will prevent a recovery. In this proposition we are unable to concur. We think

the plaintiff could well claim the loss from both companies. It was somewhat doubtful if she could recover from either; and from which she had the best chance of recovery was a problem a good lawyer would have some difficulty in solving. She undoubtedly made the claims in good faith, and with no intent to defraud, and we do not think there is any evidence which tends to so prove.

Two or three objections are suggested to rulings of the court in the admission and rejection of evidence. The evidence rejected or admitted was not by any means controlling, and would not have had or had no influence, we feel sure, on the verdict. It does not seem to us necessary to take up the time required to state the points made in relation thereto by counsel for the appellant.

We think the judgment must be affirmed.

SUPREME COURT OF ILLINOIS.

Appeal from Appellate Court. Third District.

BURLINGTON INS. CO. }

vs. }

S. M. & W. F. JOHNSON.* }

The bond of an agent's surety is to be strictly construed to limit his liability within the precise words of the agreement.

The declaration averred the advancement of moneys to the agents for commissions, expenses, etc.

Held, That where the contract with the agents did not stipulate for such advances, the sureties on the bond given for the faithful performance of the contract, cannot be held liable for their repayment.

LUCAS & SPENCER, for Insurance Co., *Appellant*.

TIPTON, BEAPER & BARR, for Johnsons, *Appellees*.

SCOTT, C. J.

This suit was brought by the Burlington Insurance Company against S. M. Johnson and W. F. Johnson, and their sureties on a bond. The declaration as last amended contains only a single count, to which the circuit court sustained the demurrer interposed by defendants, and plaintiff electing to stand by its declaration, final judgment was entered in favor of defendants. That judgment was affirmed in the appellate court of the third district, and plaintiff brings the case to this court on its further appeal.

The bond declared on was given in pursuance of the fifteenth clause of an agreement entered into between S. M. Johnson and W. F. Johnson and plaintiff. The other defendants are sureties for

* Opinion filed, May 12, 1887.

the principals in the bond. The contract between the principals and the insurance company and the bond in suit, are both set out at length in the declaration. It is averred the bond was given in pursuance with the written contract, and was to secure the faithful performance of the contract by the principal defendants. On looking into the contract, it is seen what covenants the sureties obligated themselves that the principals should perform, or in default thereof, they would become liable. A rule of law having a direct application to the case is, the understanding of a surety is to be strictly construed, and his liability will not be extended beyond the precise words of his agreement, either by implication or by construction. Applying this well-understood doctrine, the contract between the principals and plaintiff fixes the measure of the liability of the sureties, and beyond or outside of that the sureties are liable for no default of their principals. It is important then, to inquire what duties the principals owed to plaintiff under the contract they failed to perform. It is averred in the declaration, "That after the execution of the above-mentioned contract and bond, the defendants S. M. & W. F. Johnson entered upon the performance of such contract and from thence, at various times, to the time of the termination of said agency, the said S. M. & W. F. Johnson requested the plaintiff to advance money to them, as such agents, to pay commissions, expenses, etc., and to enable them, the said S. M. & W. F. Johnson to prosecute and carry on the said business of the plaintiff, and such agents, under the first-mentioned contract and with the agreement and understanding on the part of the plaintiff and the said S. M. & W. F. Johnson that they the said S. M. & W. F. Johnson, on demand would pay and return to the plaintiff any and all moneys so received by them and due from them as such agents as aforesaid. And thereupon, to wit: at various and divers times, and after the time at such request on such and other like requests from the said S. M. & W. F. Johnson, the plaintiff did advance to the said S. M. & W. F. Johnson, as such agents for the purpose aforesaid, large sums of money, to wit: "Ten thousand dollars."

It nowhere appears in the contract that the plaintiff was to advance any money to their agents for the purpose stated in the averments of the declaration, or indeed for any other purposes, nor does it contain any covenant they shall repay any money advanced to them. It cannot be claimed, with any show of reason, the bond obligates the sureties to be responsible for the default of the principals to perform any duty or obligation arising out of a contract, or

otherwise, not fairly within the provisions of the written contract between the parties, in pursuance with which the bond was entered into. That would be to enlarge the undertaking of the sureties, which the law will not permit. The money advanced to their agents, according to the averments in the declaration, is outside of the terms of the written agreement. The legal effect of the bond of the sureties is that their principals should perform and observe all the covenants and undertakings contained in the written contract, but nothing beyond what may fairly be said to be within its terms. Should it be held the sureties are liable for moneys advanced to the agents of the plaintiff, although for their business, by the same parity of reasoning they could be held liable for the default of the agents to perform any other agreement they might make with the insurance company outside of the written contract concerning their business. There is no warrant of law for extending the liability of the sureties to such an unreasonable extent. Clearly, the money advanced by plaintiff to its agents was not advanced under the terms of the written contract, and the sureties are not liable for the default of the agents in regard to it. It is not covered by the conditions of the bond of the sureties.

The judgment of the appellate court affirmed.

SUPREME COURT OF INDIANA.

Appeal from Vigo C. C.

CONTINENTAL LIFE INS. CO. }

vs.

MARY HOUSER.* }

Rulings of law made on a prior appeal are conclusive when the case comes a second time before the court, if the facts on which they were made are the same in both cases.

Where the policy was valid in its inception and there was for a time a risk, premiums previously paid cannot as a general rule be recovered as for money had and received, on account of a refusal to receive another premium.

Howe, J.

This cause is now before this court for the second time. On the former appeal, the opinion and judgment of this court are reported under the title of *Continental L. Ins. Co. vs. Houser*, 89 Ind., 258.

When the cause was returned to the court below, appellee filed an amended complaint, in four paragraphs. Of these, appellant's demurrer was sustained to the second paragraph, and appellee voluntarily withdrew the third paragraph of her complaint. Issues were joined on the first and fourth paragraphs of complaint by appellant's answer in general denial thereof. These issues were tried by a jury, and a verdict was returned for appellee, assessing her damages in the sum of \$503.75; and over appellant's motion for a new trial, the court rendered judgment on the verdict.

* Decision rendered, June 17, 1887.

Errors are assigned here by appellant which call in question: (1) the sufficiency of the first paragraph of the complaint when challenged for the first time in this court; (2) the overruling of its demurrer to the fourth paragraph of complaint; and (3) the overruling of its motion for a new trial.

1. It is conceded by appellant's counsel, in his brief of this cause, that the first paragraph of appellee's complaint, now before this court, is the same substantially as her third paragraph of complaint on the former appeal herein. We then held that such third paragraph, "although badly drawn and lacking in certainty," was sufficient on demurrer as an "ordinary count for money had and received." If the paragraph is sufficient on demurrer, and our former holding is conclusive that it is, surely it is sufficient when, as here, it is called in question for the first time by an assignment of error in this court.

2. Appellant's counsel vigorously assails in argument, the overruling of the demurrer to the fourth paragraph of appellee's complaint. Appellee's counsel claims, however, that if this ruling be erroneous, it is a harmless error, for the reason that the court below "excluded all evidence offered under the fourth paragraph of complaint." This is equivalent, we think, to an admission on the part of appellee that the verdict and judgment below herein rests, and must be rested, upon the first paragraph of appellee's complaint. Besides, the fourth paragraph of complaint now before us states substantially the same facts as were stated in the fourth paragraph of complaint on the former appeal herein, the substance of which facts we have given in our former opinion. We then held, and we see no cause for changing our decision, that the facts so stated were not sufficient to withstand a demurrer; and that the paragraph of complaint was not "good for any purpose or upon any theory." In the case under consideration, the court clearly erred, we think, in overruling appellant's demurrer to the fourth paragraph of appellee's complaint.

(3) In our opinion on the former appeal herein, we said: "The policy was valid in its inception, and there was for a time a risk; and the general rule is that, where the risk attaches, premiums cannot be recovered from the company: Bliss, L. Ins., 750; May, Ins., § 567. If there was a continuing valid risk up to the time the last premium was tendered and refused, then the premiums previously paid cannot be recovered: May, Ins., §§ 568, 569." We think this is a correct statement of the law, and certainly it is the law of this case. For

the rule of law applied by this court, in the decision of a cause, remains the law of that case in all subsequent proceedings therein: *Kress vs. State*, 65 Ind., 106; *Pittsburgh etc. R. Co. vs. Hison*, 110 Ind., 225; 8 West Rep., 888, and cases there cited.

Applying the rules of law declared in our opinion on the former appeal herein, to the case as now presented, we are of opinion that the verdict and judgment below cannot possibly be sustained.

There is no evidence in the record of this cause, as now presented, which proves or tends to prove that appellant ever had and received any money, for the use and benefit of appellee, upon any account other than premiums paid upon a valid risk assumed by appellant upon the life of Louise Hesse. Under the law of this case as declared by this court on the former appeal herein, such premiums so paid cannot be recovered back from appellant as and for money had and received. It follows, therefore, that the verdict of the jury was not sustained by sufficient evidence, and was contrary to law; and for these causes it was error in the court below to overrule appellant's motion for a new trial. This is not a case of conflicting evidence. But it is a case where the evidence wholly fails to establish a valid and legal claim against the defendant. Appellant's counsel also complained, in argument, of certain alleged errors of law occurring at the trial and excepted to, and assigned as causes for a new trial in the motion therefor; but as these errors of law are not likely to occur again, we do not now consider them. In conclusion, we commend to the consideration of appellee and her counsel the suggestions contained in the closing sentences of our opinion on the former appeal herein, and the authority cited in support thereof: *Day vs. Connecticut General L. Ins. Co.*, 45 Conn., 480; *Continental L. Ins. Co. vs. Houser*, 89 Ind., 258.

The judgment is reversed, with costs, and the cause remanded with instructions to sustain the demurrer to the fourth paragraph of complaint, and for further proceedings not inconsistent with this opinion.

SUPREME JUDICIAL COURT OF MAINE.

CITY OF PORTLAND

vs.

UNION MUT. LIFE INS. CO.*)

A mutual life company incorporated in Maine, and having its principal place of business in a city in that State is under the Maine statute taxable in such city for the personal securities in which its funds and annual income are invested.

The premiums are not personal property placed in the hands of the corporation for the future benefit of heirs or other persons within an exempting clause of the statute. They are paid absolutely as a consideration for the contract.

JOSEPH W. LYMONDS, and BION BRADBURY, *for Plaintiff.*

DRUMMOND & DRUMMOND, *for Defendant.*

LIBBEY, J.

The only question in this case that need be decided is whether the defendant corporation, a mutual life insurance company, was legally taxable for his personal property, in Portland, in 1882 and 1883. It owned stocks in national banks, in this State, of an assessable value sufficient to produce the tax assessed against it and claimed in this action, besides a large amount of other personal property, in which its funds and annual earnings had been invested. It is a corporation organized under the law of this State, and had its principal place of business in Portland, so that it was taxable there if legally taxable. By Rev. St., c. 6, § 13, "all personal property within or without the State, except in cases enumerated in the following section, shall be assessed to the owner in the town where he is an inhabitant on the first day of each April." This language embraces

* Decision rendered, March 4, 1887.

corporations as well as persons. The defendant, being the owner of the property in this State, was taxable, unless within one of the exceptions in section 14, or exempt by some other provision of the statute. It is claimed and strenuously maintained by its counsel that it is within the seventh exception enumerated in section 14, which reads as follows: "Personal property placed in the hands of any corporation as an accumulating fund for the future benefit of heirs or other persons shall be assessed to the person for whose benefit it is accumulating, if within the State, otherwise to the person so placing it, or his executors or administrators, until a trustee is appointed to take charge of it or its income and then to such trustee." The deposit so placed may be of a kind of property, such as stocks, to be returned in individuo, with its income, or it may be money to be invested at interest, and a like sum, with its accumulations, returned at the time stipulated. In either case, the obligation is absolute: *Hathaway vs. Fish*, 13 Allen, 267; *Davis vs. Macy*, 124 Mass., 193.

Are the premiums paid as the consideration for the contract of life insurance personal property placed in the hands of the insurance company as an accumulating fund for the future benefit of heirs or other persons within the meaning of this statute? We think not. The premiums are paid absolutely to the corporation as the consideration for the policy of insurance. They, with their accumulations, are not to be paid to heirs or other persons at some future day; but the sum to be paid by the special contract on the happening of the death of the insured is fixed and absolute, having no regard to the amount of premiums paid or their accumulations. The insurance may become payable, by the death of the insured within the first year, before a second premium becomes due, or it may not become due and payable till the premiums paid, with their accumulations, are double or triple the sum of the insurance; or it may never become payable by reason of a failure to pay the premiums, or a violation of some other condition of the contract by the insured; and if the insurance is payable, in case of the death of the insured, to his legal representatives, and he dies leaving no widow or issue, the insurance is not for the "benefit of heirs or other persons," but goes into his general estate to be administered as other personal assets. *Rev. St., c. 64, § 48; id., c. 75, § 10*. If anything is left after payment of debts, the heirs take by descent, and not by purchase, as when the fund is placed in the hands of a corporation to accumulate for their future benefit. The contract of life insurance is not a deposit

of the premiums to be paid to some person, with their accumulations, at some future time, but a special contract of hazard for the payment of a sum stipulated, without regard to the amount paid in premiums before the happening of the contingency.

It is claimed that the construction which we feel compelled to give to the statute casts upon mutual life insurance companies an unjust burden. If so, it is a question addressed to the legislature, and not to the court; and, since this action was commenced, the legislature has acted upon it by providing a new mode of taxing all life insurance companies; so the question is no longer of practical importance. Acts 1885, c. 329. Judgment for plaintiff.

Peters, C. J., Walton, Virgin, Foster, and Haskell, JJ., concurred.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF MISSOURI

HARRISON

vs.

HARTFORD FIRE INS. CO.*)

It was claimed that an oral agreement was made with the agent at the time of making the application, that the policy should allow the premises to be vacant for thirty days.

Held, in an action to reform the contract, that if the evidence is so conflicting or undecisive as to leave a doubt, the written contract must stand.

Held, That where a policy is deposited by insured with the agent for safe-keeping, the latter becomes his agent in any matter relating to the safe-keeping, such as misstatements regarding the contents of the document made by the agent while in his possession.

E. P. JOHNSON, *for Complainant*.

NOBLE & ORRICK, *for Defendant*.

THAYER, J. (orally).

In the case of Calvin Harrison vs. Hartford Fire Insurance Company the complainant has filed a bill to reform a policy of fire insurance on the ground of mistake. The bill alleges substantially that complainant applied to the defendant for a policy of fire insurance upon a house situated in Lewis County, which policy was to run for a year, and was to be issued in the sum of \$1,000; that at the time of making the application for this policy he entered into an oral stipulation with the defendant's agent that the policy should contain a clause to the effect that the premises might remain vacant for a period of thirty days without impairing the policy. After the

* Decision rendered, May 18, 1887.

policy was issued it seems to have been committed by the complainant to the custody of the defendant's agent, who had procured the policy, for safe-keeping, and it remained in his custody for several months until after a fire had occurred which destroyed the premises. After the fire occurred the policy was examined, and it was found to contain a clause to the effect that it should become void if the premises remained vacant for more than ten days, and, inasmuch as the premises had been vacant for more than ten days at the time the fire occurred, the defendant refused to adjust the loss. Thereupon this bill was brought to correct the alleged mistake.

The rule is well settled that an application to reform a written contract on the ground of accident or mistake must be supported by clear and satisfactory proof, otherwise it will not be granted. If the testimony is conflicting or of such undecisive character as to raise a substantial doubt in the minds of the court, the contract as written must stand. Besides the ordinary burden of proof which rests upon every litigant who holds the affirmative of an issue, there is in this class of cases the additional burden of overcoming the strong presumption created by the contract itself, which the proceeding seeks to reform. I refer to *May, Ins.*, § 566, and a large number of cases cited in the note to that section. In deference to the foregoing rule I am compelled to dismiss the present bill.

The testimony upon which chief reliance is placed to make out the allegations of this bill is that of the complainant's son, who testified in substance that when he applied for this policy he inquired of the agent of the defendant how long the premises might remain vacant without vitiating the policy, and that the agent replied thirty days. The agent of the defendant (who seems to testify in this case very fairly) states that he has no recollection of having had any such conversation with the complainant's son. He does recollect that several weeks after the policy was issued, and after it was placed in his custody for safe-keeping, the complainant himself inquired of him (the premises then being vacant) how long the premises might remain vacant without vitiating the policy, and he says that he may have answered that question by saying thirty days, but whether he did make such an answer or not he does not recollect. If he made such an answer to the complainant's inquiry, of course it was an erroneous answer, and it may have misled the complainant, but if the complainant was misled by that statement he was misled by his own agent (to whom he had intrusted the policy for safe-keeping) as to the contents of the policy. In any event a statement

of that kind made after the policy had been written and delivered would be no ground for reforming the policy. In order to reform the policy it must clearly appear that before the policy was issued there was a distinct oral agreement that the policy should contain a clause to the effect that the premises might remain vacant thirty days, and that through inadvertence or mistake the stipulation was omitted from the policy. As I stated before the proof does not satisfy me that there was any such oral agreement antedating the execution of the written policy, for that reason I am compelled to dismiss the bill.

SUPREME COURT OF MICHIGAN.

GUEST

vs.

NEW HAMPSHIRE FIRE INS. CO.*

Where the application was oral, and there was no inquiry regarding incumbrances, a failure to mention the existence of a mortgage is not a misrepresentation.

A policy-prohibition against further insurance by the insured owner will not prevent a mortgagee from independently insuring his own interest.

The rejection of evidence as to value from one not showing any competent knowledge on the subject is not error.

SHEPARD & LYON, *for Plaintiff.*

PRATT & GILBERT, *for Defendant.*

CAMPBELL, C. J.

In this case plaintiff recovered on a policy of insurance upon a dwelling. He had held a contract of purchase, which he had assigned, as collateral to a building debt, to one Harrison. Harrison afterwards took out a policy for his own interest. After the house burned, Harrison collected that policy, and applied the proceeds on the mortgage. The company defended on the ground that plaintiff did not state truly his interest; that the Harrison policy constituted other insurance, and vitiated this policy; and on some other questions, chiefly relating to the same general grounds. There was no written application, and there was no written questions and answers. The policy contained no reference to title, except the recital: "Lot held by virtue of a land contract." There is nothing in the case which shows that there was any misrepresentation concerning the title, unless a failure to mention the incumbrance to Harrison can be so treated. There was testimony both from plaintiff and the insurance agent indicating that the latter

* Decision rendered, May 8, 1887.

knew all about it. The case practically comes back to the question whether failure to mention the mortgage in the policy is a practical misrepresentation.

It was held in *Castner vs. Insurance Co.* (46 Mich., 15, 8 N. W. Rep., 554) that a person getting insurance was not required to show the exact condition of his title unless requested to do so: In *Farmers' Mut. Fire Ins. Co. vs. Fogelman* (35 Mich., 481) it was held equitable ownership would support a recital of ownership: In *O'Brien vs. Ohio Ins. Co.* (52 Mich., 131, 17 N. W. Rep., 726) it was held a failure to mention incumbrances, if not inquired about, and if the application was oral, and no deceit practiced, was immaterial. A similar principle was laid down in *Tiefenthal vs. Citizens' Mut. Fire Ins. Co.*, 53 Mich., 306, 19 N. W. Rep., 9. As the loss of the insured property would diminish the mortgagor's means of paying the mortgage, it cannot be said that a mortgage lessens the insurable interest, unless there is a stipulation to the contrary, or some very peculiar state of things. The policy was not void here for that reason.

The policy is made voidable if the assured obtains further insurance without the written consent of the company indorsed thereon. But this cannot prevent the mortgagee from insuring his own risk. The assured could not prevent his doing so, and it is not the act of the assured. The charge of the court was emphatic that, if there was any collusion so that the assured was to be interested in the further policy, his insurance would be avoided. The jury have settled the question in favor of plaintiff. This court has recently decided that subsequent insurance by a mortgagee cannot be treated as further insurance which will vitiate a policy in favor of the mortgagor, and it is not necessary to enlarge upon it: *Carpenter vs. Continental Ins. Co.*, 28 N. W. Rep., 749. This being so, the defendant is in no way interested in the use which the mortgagee made of his insurance-money. It was entirely foreign to this policy, and can be no defense to it.

We do not think the record sustains the objection that the court submitted the case to the jury on the proofs of loss furnished to the company.

It was not error to reject the opinion of Mr. Hannah concerning the value of the house insured. He did not show that he had any competent knowledge. The other points are all dependent on what we have already referred to.

The judgment should be affirmed. The other justices concurred.

SUPREME COURT OF IOWA.

Appeal from Circuit Court, Hardin County.

RANISBARGER

vs.

UNION MUT. AID ASS'N.* }

In an action at law against a mutual benefit association to recover the amount of an assessment upon the members which the association have refused to make, *held*, on demurrer, that the action cannot be maintained. In such a case the remedy is by a proceeding to compel the association to make the assessment.

This is an action at law on a certificate of membership in the defendant company. The certificate was issued to Enoch Johnson, plaintiff's father, and it constituted him a member of the association. By it the association agreed, in consideration of the payment by said Johnson of certain dues and assessments, to pay, on proof of his death, the plaintiff and her husband, the net proceeds of one full assessment at schedule rates upon all the members in good standing at the date of such death. This agreement is expressed in the following language: "Upon receipt of satisfactory proof of death of a member of the association * * * the secretary shall make a assessment upon each member of the association at the rates prescribed in the following schedule: * * *. Such assessments shall be paid to the secretary within thirty days from the day on which the notice bears date. Five days shall be allowed the secretary for making such notices after the date thereof, and five days' grace shall be allowed the members in addition to the time mentioned in the

Decision rendered, June 25, 1887.—From *Northwestern Reporter*

notice. The proceeds of such assessment, not exceeding the sum of twenty-five hundred dollars, shall be paid to the beneficiary named in the certificate within ninety days from the receipt of satisfactory proofs of death."

It is alleged in the petition that Johnson had in all things performed his part of the agreement, that he was dead, and that proofs of his death had been filed with defendant as required by the contract; but that it had failed and refused to make an assessment on the members of the association, or to collect or to pay over the proceeds of such assessment. It is also alleged that the proceeds of one assessment upon all members in good standing at the time of the death would amount to \$2,500. A demurrer to the petition was overruled, and defendant refusing to plead further, judgment was entered against it for one-half of the maximum amount of the certificate, that being the interest claimed by plaintiff. Defendant appealed.

ALFORD & GATES and GEO. W. WARD, *for Appellant.*

HUFF & PILLSBURY, *for Appellee.*

REED, J.

Defendant is a mutual association, having no funds for the payment of death-losses except such as may be realized from assessments on its members. It did not contract for the payment of a specified sum on the death of the members, but its undertaking was that it would make an assessment on its members at the time of the death, and pay over the proceeds of such assessment to the beneficiary. The question raised by the demurrer is whether, upon the refusal of the defendant to make the assessment to pay a death-loss, an action at law can be maintained for the recovery of such sum as it might be supposed would have been realized if the assessment had been made. We considered this question in *Bailey vs. Mutual Ben. Ass'n* (27 N. W. Rep., 770), and we there held that the action could not be maintained. The remedy of the beneficiary, if any, is by a proceeding to compel the association to make the assessment. It is fair to the circuit court to say that that decision was made since the judgment was rendered in this action. Following that holding, the judgment will be reversed.

Beck, J., dissents on the ground expressed in his dissenting opinion in *Bailey vs. Mutual Ben. Ass'n*, cited in the majority opinion.

SUPREME COURT OF NEBRASKA.

IN RE BABCOCK.*

That part of sec. 6, ch. 16 of Nebraska Statutes of 1885, which requires of insurance companies a capital of \$100,000 refers to life companies organized within that State as well as elsewhere. Bankable notes cannot be considered a part of the capital within the statute.

"To the Court:

LINCOLN, March 21, 1887.

"The Honorable Supreme Court, State of Nebraska:—

"GENTLEMEN: In the transaction of business in my office it has become necessary for me to know the law regarding the capital, if any, required of a life insurance company organized within the State of Nebraska. If it is not inconsistent with your duties, in order that I may fully understand what law is applicable, I respectfully solicit your opinion upon the following questions: (1) Does that part of section 6 of chapter 16, Comp. St. 1885, pp. 182, 183, which requires a company or association, partnership, firm, or individual, to be possessed of a capital of \$100,000, refer to life insurance companies organized within the State of Nebraska? (2) If it does, would bankable notes be considered capital, within the meaning of the law?

"Respectfully submitted,

"H. A. BABCOCK, Auditor Pub. Accts."

BY THE COURT. Chapter 25 of the Revised Statutes, revision of 1866, entitled "Incorporations—Insurance Companies," contained provisions regulating all kinds of insurance companies; that is, its provisions were general, making no distinction between the legal regulations of life, fire, accident, or any other kind of companies or

* Decision rendered, March 10, 1887.

business. That chapter contained section 6, precisely as it is now contained in chapter 16 of the Compiled Statutes, and it clearly embraced in its provisions every kind and character of insurance known to the business of this State, including life insurance. Subsequently, on the twenty-fifth day of February, 1873, there passed the legislature, and took effect June 1st of that year, the act entitled "An act regulating insurance companies," which was published in and constitutes chapter 33 of the General Statutes compiled and published that year. Section 41 of said chapter is in the following words: "Sec. 41. That portion of chapter twenty-five of the Revision of 1866 which relates to insurance companies, and all acts and parts of acts amendatory and supplementary thereto, are hereby repealed, except so far as the same relates to the business of life insurance companies; and the auditor of State is authorized to return the deposits made under section twelve, chapter twenty-five of the Revision of 1866, when the companies making the same shall have complied with this act: provided, such deposits shall not be needed for the payment of losses due from the company having made the same."

The said chapter 25 is carried forward in the latest compilation as chapter 16, and is believed to remain in force for some purpose,—manifestly for that of controlling life insurance companies, and the business of life insurance; and clearly all of its provisions, including the one requiring a corporation or association, partnership, firm, or individual, to be possessed of a capital of \$100,000, which are applicable, in the nature of things, refers to life insurance companies organized within the State of Nebraska, as well as those organized in other States or countries.

No mention being made in the section referred to of bankable notes, or securities other than "stocks of some one or more of the States of this Union or of the United States, * * * or bonds of cities of the United States," we have no doubt that the securities must be confined to those thus designated, which does not include bankable notes.

UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF NEW YORK

MARCK

vs.

SUPREME LODGE KNIGHTS OF HONOR.*

An expelled member of a benevolent association, on appeal was re-instated, but died pending the appeal.

Held, That his representative was entitled to the benefit, the appeal did not abate by death.

CHARLES STECKLER, *for Plaintiff*.

MORRIS GOODHART, *for Defendant*.

SHIPMAN, J.

Gisbert W. Marck, a member of German Oak Lodge Knights of Honor, was expelled from the lodge on April 8, 1884, appealed to the grand dictator from said sentence, of which appeal said lodge had notice, and died on April 25, 1884, pending said appeal. Subsequently the grand dictator set aside the judgment of expulsion. Marck was re-instated by vote of the lodge, and the dues and assessments which were due up to the date of his death were received. No appeal was ever taken from the vote of re-instatement.

If the analogies of the common law are to be regarded, the appeal did not abate by the death of Marck: *Green vs. Watkins*, 6 Wheat., 260. By the reversal of the sentence of expulsion, and by the action of the lodge, he was re-instated as at the date of his ex-

* Decision rendered, February 14, 1887.

plulsion, and was entitled to his benefit. It may be added that such was at the time the law of the order, which had held, by its supreme dictator, that if a decision of expulsion was reversed on final appeal, the appellant stands a member as if there had been no such judgment, and he must pay all back dues and assessments; and if, pending the appeal, he dies, has regularly tendered his dues and assessments, and after death, the appeal is decided in his favor, his benefit will be paid as one who died in good standing, less the amount of his tendered and unpaid dues and assessments. The motion for a new trial is denied.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF MISSOURI.

KNAPP, STOUT & COMPANY
v.
NATIONAL MUT. FIRE INS. CO.
—
SAME
v.
PEOPLE'S MUT. FIRE INS. CO.*

In Missouri, a foreign insurance company is prohibited from carrying on business until it has filed with the insurance commissioner a certificate stipulating that service may be made upon him; and, where it is alleged in the petition that a foreign company is doing business in the State, it will be presumed that it has complied with the law, and default will be entered on service upon the commissioner, though he have refused to receive the summons.

At Law.

G. M. STEWART, *for Plaintiff.*

BREWER, J. (orally).

In these cases a default is asked. The petition alleges that the defendant is a foreign insurance corporation, doing business in this State, having agents and offices located here. Service was made upon the insurance commissioner. He declined to receive the summons and copy of the petition that was handed him, no reason being given therefor. The service was good, if he had power to receive the service. The law of Missouri forbids any foreign insurance company doing business until it has filed with the insurance commissioner a certificate stipulating that service upon him shall be personal service upon the company. As it, alleged in the petition that the company was doing business in this State, having agents and offices here, we are to presume that it has complied with the law; and therefore, prima facie, at least, the service is good, and default will be entered.

* Decision rendered, April 21, 1887.—From *Federal Reporter*.

LOWER COURT DECISION.

MUTUAL BY-LAWS REGARDING VACANCY.

Court of Chancery of New Jersey

MILLER

vs.

HILLSBOROUGH FIRE ASS'N.*

Every policy-holder in a mutual company is presumed to know the by-laws and conditions of insurance, and where such by-laws provide that the policy shall be void in case of vacancy, the policy is avoided in the hands of an assignee even though it contains no provision of the kind annexed to it, and the assignment was approved by the secretary. Such assignee after holding the contract for twenty-one months cannot claim the position of an innocent holder who was misled.

Bill for injunction. On demurrer to amended bill.

GEO. S. GROSVENOR, *for Complainant.*

J. D. BARTINE, *for Defendant.*

BIRD, V. C.

The history of this case, in detail, appears in the opinion of Chancellor Runyon, filed February 17, 1887, with the exception of one allegation which has since been made by an amended bill. That additional allegation is, in substance, that the defendant company issued a policy of assurance, with several important conditions annexed thereto; that that policy was afterwards (February 22, 1882) assigned to the complainant; and that from April 1, 1882, to November 28, 1883, the premises (a dwelling-house) remained unoccupied,

Decision rendered, June 21, 1887.

and that, while so unoccupied, he was twice assessed, and twice paid assessments, and that on the said twenty-eighth day of November, 1883, the said premises were consumed by fire; and that said company refuse to pay the value of said loss on the ground that said house was unoccupied,—one of the conditions, as expressed in the by-laws of said company, being that the assured forfeits all right to any assurance if he suffers the premises assured to remain unoccupied; and this last condition or by-law was not one of the conditions so as aforesaid annexed to and made part of the policy of assurance; and that thereby—i. e., by annexing several conditions to the policy, and not annexing one so important and vital—the complainant was deceived and misled and defrauded; that is, by presenting a policy with certain conditions annexed, he was assured in the law, if not in fact, that those were the only conditions, and that in truth he accepted the assignment of said policy, and had the said assignment approved by the secretary of the company, with the full understanding, conviction, and belief that the said conditions, so as aforesaid annexed to the said policy, were the only conditions imposed upon any of the members of said company, and that, up to the time of said loss, he did not know of any other condition, or that one condition was that said dwelling should be occupied in order to secure a recovery.

The chancellor decided in very plain terms that no one of the officers of the company could bind the company in such case. But the complainant now seeks to go a step further, and to overcome the views of the chancellor, by alleging that the company itself, in issuing such a policy (with only a portion of the conditions annexed), committed a fraud upon every innocent holder. But on this very point the chancellor has provided an answer, very complete, and which I think is undisputed law everywhere, by declaring that every policyholder in such company (being a mutual insurance company) is presumed to know the by-laws and conditions of insurance in the company. This being the law, it certainly applies to this case, in which the complainant held the policy so assigned to him from February 22, 1882, to November 28, 1883, during which period he had the amplest opportunity to learn all about the rights and liabilities of the insured, and the condition upon which his rights could be made secure. Clearly, it is not for me to review the chancellor. Clearly, also, the law is that the complainant is presumed to have known all of the conditions and by-laws on which mutual insurance companies issue their policies. I must sustain the demurrer, with costs.

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REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF WISCONSIN.

OSHKOSH PACKING & PROVISION CO.)

vs.)

MERCANTILE INS. CO. OF MOBILE, ALA.*)

The policy of a fire insurance company contained the following clause: "All fraud or attempt to defraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy." *Held*, charging jury in suit on policy, that it is incumbent on the defendant, under this clause, to show that the insured, knowingly and intentionally, swore falsely to the proofs of loss in some material respect pertaining to the extent of the loss, in order to maintain the defense of fraud.

* Decision rendered, April 11, 1887.—From *Federal Reporter*.
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In such case, however, a serious discrepancy between the true value of the property and that sworn to in the proofs of loss, or between the quantity of any kind of personal property actually destroyed and that stated in the proofs, would be evidence bearing upon the issue of fraud, and a fact to be considered by the jury in determining whether there was fraud or false swearing, within the meaning of the policy, in the proofs.

Rev. St. Wis., 1878, § 1,943, provides that "wherever any policy of insurance shall be written to insure any real property, and the property insured shall be wholly destroyed without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and measure of damages when destroyed." *Held*, That the expression "wholly destroyed," in this statute, is equivalent to "total loss," and that "total loss," as applicable to a building, does not mean that the materials of which it is composed are all utterly destroyed or obliterated, but that the building, though some part of it may remain standing, has lost its identity and specific character as a building, and has become a broken mass, so that it cannot any longer be properly designated as a building.

Under this statute a fraudulent overestimate in the proofs of loss as to the value of real property would not work a forfeiture, although the policy of insurance expressly provided that such representation should have that effect.

In such case, however, fraudulent representations as to the value and quantity of the personal property covered by the same policy of insurance will work a forfeiture as to the whole policy, and defeat the right of the insured to recover anything whatsoever upon the real property included in such policy.

In such case, moreover, fraudulent representations as to the value of the real property may be taken into consideration by the jury in determining whether the statements made as to the quantity and value of personal property destroyed were or were not fraudulent, where such statements were not in fact correct.

FINCH & BARBER and CHAS. W. FELKER, *for Plaintiff*.

GABE BOUCK and JOHN W. HUME, *for Defendant*.

DYER, J. (charging jury).

On the fifteenth day of May, 1885, the Mercantile Insurance Company of Mobile, Alabama, the defendant in this suit, in consideration of the payment to it of a certain premium, issued to the plaintiff, the Oshkosh Packing & Provision Company, a policy of insurance by which it insured the plaintiff to the amount of \$1,500 against loss of certain property therein specified by fire for the period of one year, extending from May 15, 1885, to May 15, 1886. The specifications of property insured, with the several amounts of insurance on the different classes of property as contained in the policy, are as follows:—

\$677.40 on the two and three story, frame packing-house, including dry and chill room, and on one-story frame boiler and engine house adjoining, including steam-heating and hoisting apparatus (excepting engine and boiler), situate on the west bank of Lake Winnebago, east of Chicago and N. W. R. R. tracks, Oshkosh, Wisconsin.

\$77.43 on engine and boilers, pumps, and other connections contained in said engine and boiler house.

\$212.91 on fixed and movable machinery, shafting, bolting, tanks, coolers, piping, tubing, furniture, fixtures, tools, and all other implements used, all contained in said packing-house and boiler and engine house.

\$483.87 on hogs, and hog and beef product, lard, and grease, rendered and in process of rendering, salt, ice, cooperage, boxes, coal, syrups, and all material used in packing and curing meats, their own, or held by them in trust or on commission, or sold but not delivered, contained in above-described packing-house.

\$29.04 on one-story, frame beef-house south of above-described premises.

\$19.35 on beef product contained therein.

—Making a total insurance on these different classes of property of \$1,500. The policy also contains certain clauses or conditions which have a bearing upon the defense here interposed, and which I read to you:—

First. All fraud or attempt to defraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy.

Second. Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company, and, as soon after date as possible, render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies thereon; also the actual cash value of the property and their interest therein; for what purpose and by whom the building insured or containing the property insured, and the several parts thereof, were used at the time of the loss; when and how the fire originated; and shall also produce a certificate under the hand and seal of a magistrate or notary public (nearest to the place of the fire, not concerned in loss as a creditor or otherwise, not related to the assured) stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate or notary public shall certify.

Third. The cash value of the property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured at the time of the fire of replacing the same; and, in case of the depreciation of such property by reason of age, wear and tear, location, change in style, lack of adaptation to profitable use, or other causes, from use or otherwise, a suitable deduction from the cash cost of replacing the same shall be made, to ascertain the actual cash value.

The plaintiff, claiming that there was a total loss of the insured property by fire on the thirteenth day of September, 1885, seeks to recover the amount of the insurance for which it alleges the defendant is liable under this policy.

The defendant alleges, by way of defense, that the plaintiff, in the proofs of loss furnished to the defendant under one of the provisions

of the policy which I have just read, falsely and fraudulently stated and swore that it had sustained a loss by the fire to the amount of \$18,210.70, when in truth it did not sustain a loss to exceed \$10,000. Further, that the plaintiff falsely and fraudulently stated and swore in its proofs of loss that it had sustained by the fire-loss of its stock in business to the amount of \$5,965.90, when in fact its loss of stock did not exceed \$1,000. This is what the defendant alleges by way of defense. In other words, the defense is that the plaintiff knowingly and fraudulently exaggerated and misrepresented its loss, for the purpose of obtaining from the insurance company more money on account of the loss than it was justly entitled to.

Under the conditions of this policy, it became the duty of the plaintiff company, after the fire, to render to the insurance company a particular account of the loss, duly signed and sworn to; in short, to make what has been spoken of as "proofs of loss," which should fully and truthfully exhibit to the company the character, extent, and circumstances of the loss, this being very properly required as a basis of either payment of the insurance, or any other future action of the parties. In due time after the fire, proofs of loss were made in this case which are in evidence. They appear to have been made and sworn to by Charles G. Baumann, president of the Oshkosh Packing & Provision Company, and state the losses as follows:—

On two and three story, frame packing-house, including dry and chill room, and on one-story, frame boiler and engine house adjoining, including steam heating and hoisting apparatus (except engine and boiler), \$7,594.92; on one story, frame beef-house, \$649.35; on boiler, engine, pump, and other connections, \$938.34; on stock in packing-house consisting of hams, shoulders, mess pork mess beef, sausage, lard, tallow, etc., \$5,965.90; on machinery and apparatus not part of the building, \$3,062.19.

—Making the total loss, as claimed and sworn to in the proofs, \$18,210.70.

As we have seen, the policy in suit provided that all fraud, or attempt at fraud, by false swearing or otherwise, should cause a forfeiture of all claim on the company under the policy. To maintain this defense of fraud in making the proofs of loss, it is incumbent upon the defendant to show that the insured—that is, some one of the officers of the plaintiff company—knowingly and intentionally swore falsely in the proofs of loss in some material respect pertaining to the extent of the loss. The clause in the policy, in regard to fraud and false swearing, is to be viewed in connection with the general nature of the contract; and, so viewing it, it is

plain that it was intended thereby to require the insured to give the insurer real and reliable information as to the amount of the loss; and that an honest mistake, or unintentional error, or unintentional misstatement in the proofs of loss, would not avoid liability on the part of the insurance company. If any untruthful statements were made in the proofs of loss in respect to the value or quantity of the property destroyed, it must appear, in order to defeat a recovery on that ground, that such false statements were intentionally and willfully made for the purpose of deceiving and defrauding the insurance company. The mere fact, in a case of this kind, that a party who seeks to recover insurance has even largely overstated the value of the property destroyed, will not, of itself and alone, relieve the company from liability. In order to prevail on this ground, the insurer must show that the insured knew it was worth much less than he swore it to be. There may be an honest difference of opinion as to the real value of property. Such a difference of opinion does often exist in the minds of men as to the value of property, because that question may rest largely in opinion. And if the jury find that even though a valuation is largely excessive, yet if it was made by the insured in good faith, his statement in that respect cannot be held to amount to false swearing or fraud, within the meaning of the policy. But the insurance company did not agree to pay, if the plaintiff should intentionally endeavor to make out its loss larger than it really was, although the jury may believe that it did suffer a serious loss. In other words, if the plaintiff comes into court attempting to perpetrate a fraud upon the insurance company, by claiming to recover insurance on losses which it knows it did not sustain, it ought not to succeed in such attempt. While the law allows indulgence for mistakes honestly committed, it does not relieve a party if there be a purpose on his part to commit a fraud. And although, as I have said, the mere fact that you should find the actual loss to be less—even much less—than that stated by the insured in its preliminary proofs of loss, would not of itself be sufficient to sustain the defense, yet if there is a serious discrepancy between the true value and that sworn to in the proofs, or between the quantity of any kind of personal property actually destroyed and that stated in the proofs of loss, such discrepancy would be evidence bearing upon the issue of fraud, and a fact to be considered by you in determining whether there was fraud or false swearing, within the meaning of the policy, in the proofs.

These are the principles of law governing this branch of the case, and to be borne in mind by you as you consider and weigh the evidence in passing upon this defense of fraud in making the proofs of loss. The question, as you see, is, did Baumann, the president of this company, when he made these proofs of loss, intentionally, designedly, make false statements as to either the value or quantity of the property destroyed, intending thereby to defraud the insurance company?

In this State we have a statute which provides that "whenever any policy of insurance shall be written to insure any real property, and the property insured shall be wholly destroyed without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and measure of damages when destroyed." The expression "wholly destroyed" in this statute is equivalent to total loss; and total loss, as applicable to a building (for this statute relates only to real property), means, not that the materials of which it is composed were all utterly destroyed or obliterated, but that the building, though some part of it may remain standing, has lost its identity and specific character as a building, and instead thereof has become a broken mass, or so far in that condition that it cannot be properly any longer designated as a building. When that has occurred, then there is a total destruction or loss: *May, Ins.*, § 421a. Or, as it is said in one of the authorities which treats of this question, a total loss does not mean an absolute extinction. The question is not whether all the parts and material composing the building are absolutely or physically destroyed, but whether, after the fire, the thing insured still exists as a building: *1 Wood, Ins.* § 107.

Now, applying to the case the definition of "total loss" thus given, the court must instruct you, upon the undisputed evidence, that the buildings covered by this policy were wholly destroyed, within the meaning of the statute referred to. There is, moreover, no evidence that the fire was caused by the criminal fault of the insured. In this connection you will again observe that the policy secured to the plaintiff insurance to the amount of \$677.40 on the packing-house and boiler and engine house, and \$29.04 on the one-story, frame beef-house; and as these buildings were wholly destroyed, without criminal fault on the part of the insured, if you find that there were no fraudulent representations in the proofs of loss touching the quantity or value of the personal property destroyed, it will

be your duty to accept the amount of insurance on the buildings as stated in the policy as representing the true amount of the plaintiff's loss on the buildings.

The question upon which the determination of this case depends, is whether there was intentional false swearing or fraud in the proofs of loss as to either the quantity or value of any of the personal property covered by the policy. That is the pivotal point in the case, and that is the question you will take up in the very beginning of your deliberations. If you find that, in stating either the quantity or value of any of the personal property in question in the proofs of the loss, the plaintiff was guilty of designedly false representation,—that is, willful, intentional fraud,—then I am of the opinion that the plaintiff can recover nothing upon the policy, either on account of the buildings or personal property, and your verdict in that case will be for the defendant. At the same time you will understand that, even if you should think there was a fraudulent overestimate of the value of the buildings, such fraud would not defeat a recovery upon the policy. For instance, suppose you should be of the opinion that there was fraud in the valuation of the buildings in the proofs of loss, but no fraud in the statements of quantity or valuations of personal property, the plaintiff would still be entitled to recover as to both buildings and personal property, for the reason that such fraud would not be material because of the statute I have read in relation to real property which is insured and wholly destroyed. To defeat a recovery, the alleged fraud must arise out of and inhere in representations as to the personal property, contained in the proofs of loss. And so you see that it is not fraud in the valuation of the buildings that will defeat the plaintiff's right to cover, but only fraud, if any, in the representations in the proofs of loss relating to the personal property.

Upon this question I think I must have made myself clearly understood; and so your inquiry will be whether Charles G. Baumann, the president of the packing and provision company, did or did not, in the proofs of loss which he signed and swore to, willfully and fraudulently misstate or misrepresent either the value or quantity of any of the personal property destroyed. The question for you to determine in deciding this issue is not alone whether the values and quantities fixed by the plaintiff in the proofs of loss were the true values and quantities of the property destroyed, but whether it was an intentionally false estimate and claim. Of this question, which is purely one of fact, you are the sole and exclusive judges, and I can-

not undertake, as, indeed, it is unnecessary for me to do, to review the evidence. That has been very effectively done by counsel in their arguments, and I have no doubt you understand precisely what the claims of the parties are as to each class of personal property specified in the policy. Here as one class, you have the engine and boiler, pumps and other connections, contained in the engine and boiler house. Then as another class, you have the fixed movable machinery, shafting, belting, tanks, coolers, piping, tubing, furniture, fixtures, tools, and implements. As another class, the beef and hog product in store, including lard, grease, tallow, etc., in the packing-house; and, finally, the beef product in the beef-house. Now, did Baumann, the representative of the plaintiff company, fraudulently misrepresent, in the proofs of loss, either the quantity or value of any of this property alleged to have been destroyed by the fire of September, 1885? As I have said, the question is not merely whether he overestimated quantities, or overstated values, but did he designedly, with the purpose of defrauding the insurance company, make statements in said proofs of loss as to the quantity or value, which he knew to be false? And, in determining this issue, you will consider all the evidences bearing upon it, and all the facts and circumstances which preceded and attended the loss, as they have been developed in the testimony.

The burden of proof in establishing the defense interposed is upon the defendant. Fraud is not to be presumed. It must be affirmatively shown. The solution of the questions involved depends upon the conviction produced in your minds by the evidence.

I have said that a fraudulent overestimate of the value of the buildings in the proofs of loss will not of itself vitiate the policy, or defeat a recovery by the plaintiff. It will be at the same time understood that, if fraudulent representations as to the value of the buildings are proved, the proof of such fraud may be taken into consideration by you in determining whether the statements made as to the quantity and value of personal property destroyed, if they were not correct, were or were not fraudulent. Although fraud in stating the value of the buildings will not of itself authorize a verdict for the defendant, evidence of such fraud may be used in ascertaining the intent with which any misstatements of the quantity or value of personal property destroyed were made, if you find any such misstatements were made. And by this form of expression I do not mean to convey any intimation as to whether misstatements were or were not made, as that is a question for you alone to determine.

Now, gentlemen, to sum up concisely this branch of the case, if you find from the evidence that the witness Charles G. Baumann, in the proofs of loss which he signed and swore to, designedly misrepresented either the quantity or value of any of the personal property covered by the policy, and destroyed by the fire, then the plaintiff can recover nothing in this suit, and your verdict should in that case be for the defendant upon the entire claim sued on; but if you should find otherwise,—that is, that Baumann did not fraudulently misrepresent in the proofs of loss either quantity or value of any of the personal property destroyed,—then your verdict should be for the plaintiff as to both the buildings and personal property; and, if such should be your conclusion, then there will remain the question, what should be the amount of the recovery?

Upon that question I instruct you, first, that, finding the plaintiff entitled to a verdict, it will be your duty, so far as the buildings are concerned, to allow the plaintiff just what the policy names as the amounts of insurance thereon; namely, \$677.40 on the packing-house, boiler and engine house, and the steam-heating and hoisting apparatus connected therewith, and \$29.04 on the beef-house,—making in all, on account of the buildings, \$706.44. That will dispose of so much of the case, namely, the buildings.

Then as to the personal property, I have to call your attention to a clause in the policy not yet referred to. I will read it:—

In case of any other insurance upon the property hereby insured, whether valid or not, or made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount so insured thereon.

There was other insurance on this property, and the total amount of all insurance upon it (I am speaking now of the personal property) was as follows: On machinery and fixtures, \$2,200.06; on engine, boiler, and pumps, \$800.06; on stock in packing-house, \$5,000; on product in beef-house, \$199.96. It is agreed by the parties that the proportion which the sum insured by the policy here in suit bears to the whole amount of all the insurance on this property is 9.675 per cent. If you find for the plaintiff, it will be your duty to ascertain the amount of the actual loss on each of these classes of personal property. For example, what was the total loss on account of machinery and fixtures? What do you determine that to be? Having ascertained that, then what will be 9.675 per cent of the amount of such loss? Thus you will go through each of these classes of per-

sonal property, if you find the plaintiff entitled to recover, and get the percentage on each as I have indicated. If, as to either class, you should find the loss of such amount that, when you take 9.675 per cent thereof, the amount remaining would exceed or just equal the sum named in the policy as the insurance on that class of property, then the plaintiff's recovery as to that property would be just the insurance thereon. For illustration, suppose you take the engine, boiler, and pumps. If you should find the loss on that property of such amount that, when you take 9.675 per cent of it, the amount remaining would be more than or just equal to the amount of the insurance on engine, boiler, and pumps, as named in the policy, then the plaintiff would be entitled to recover just the amount named in the policy as the insurance thereon. But if, as to either class of the personal property, you should find the loss thereon of such amount that, when you take 9.675 per cent thereof, the amount remaining would be less than the sum named in the policy as the insurance thereon, then the plaintiff's recovery as to that property would be the proportion or percentage thus ascertained. Then it would not be the amount named in the policy. You thus see it depends upon what your determination shall be as to the exact amount of loss as to each class of the property.

The figuring out of this percentage—I presume you understand this already from what the court has said—is not necessary as to the buildings, because the total insurance on the buildings was \$6,999.84. By virtue of the statute that I have referred to, as they were wholly destroyed, that amount is taken to be the amount of the true loss on the buildings, and 9.675 per cent thereof is just the amount of the insurance on the buildings specified in the policy. That is the reason why the court told you a few moments ago that, if you find for the plaintiff, it will be entitled to recover, as to the buildings, just the amount of the insurance thereon. In arriving at the values of personal property destroyed, regard should be had to one of the clauses in the policy which I have read to you, namely:—

The cash values of the property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured at the time of the fire of replacing the same; and in case of the depreciation of such property by reason of age, wear and tear, location, change in style, lack of adaptation to profitable use, or other causes from use or otherwise, suitable deduction from the cash cost of replacing the same shall be made, to ascertain the actual cash value.

The total amount of the plaintiff's claim is \$1,483.12, and, in any event, that must be the limit of its recovery, except, if entitled to re-

cover, the plaintiff should have interest on the aggregate sum recovered, at 7 per cent, from December 14, 1885.

If you give the plaintiff a verdict, you will add together the various amounts of loss on the different classes of property, ascertained in the way I have pointed out, computing interest on the aggregate from the time and at the rate named, and let your verdict express one sum as the amount of the recovery.

UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF IOWA, C. D.

PARSONS ET AL.

vs.

CHARTER OAK LIFE INS. CO. ET AL.*

A receiver was appointed for an insolvent Connecticut life company, by a Connecticut court under the statutes of that State. Subsequently a receiver was appointed by an Iowa court for property situated in that State at the instance of Iowa policy-holders and in their interest.

Held, That all the policy-holders, by virtue of their membership, were bound by the Connecticut statute, and the receiver appointed by that State had control of all the assets for the general benefit of the policy-holders.

Held, That the policy-holders of another State could not claim superior rights to property situated in that State.

GATCH, CONNOR & WEAVER and KAUFFMAN & GUERNSEY, *for Complainants and Intervenors.*

CUMMINS & WRIGHT, *for Defendants.*

SHIRAS, J.

This cause was originally commenced in the Circuit Court of Polk County, Iowa, and, upon application of defendants, was removed to this court. In the bill filed by complainants it is averred that the Charter Oak Life Insurance Company is a corporation organized under the laws of the State of Connecticut, for the purpose of carrying on the business of life insurance; that it has been thus engaged for many years, and has issued policies on the lives of many persons residing in Iowa, as well as on the lives of residents of many other States; that it has invested large parts of its assets in Iowa, now

* Decision rendered, June 11, 1887.

owning real estate and other property to the estimated amount of \$100,000, situated in the State of Iowa; that a short time since the said corporation became insolvent, and in a proceeding brought for that purpose in the Superior Court of the City of Hartford, Connecticut, the company was adjudged to be insolvent, and in September, 1886, a receiver was appointed by that court, and authorized to take possession of the property and assets of said corporation, in order that the affairs of the company might be legally wound up, and the corporation be dissolved; that the complainants herein are citizens of Iowa, holding policies of insurance in said company, and therefore creditors of said company, and as such they have an equitable interest in the property of the company situated in said State of Iowa prior and superior to the rights of creditors residing in other States, and for the protection thereof complainants pray for the appointment of a receiver to take possession of the property of the company in Iowa, the same to be held and disposed of by the court for the protection of complainants and the other Iowa policy-holders.

The State court appointed a receiver, who gave bond in the sum fixed by the order of appointment, and thereupon the cause was, upon application of the defendants, removed to this court. Several policy-holders have intervened for the protection of their interests, and the receivers appointed in Connecticut have likewise intervened, and ask that the order appointing the receiver in Iowa be set aside, that their right to the possession and control of the assets of the company in Iowa be recognized, and that if deemed necessary, an ancillary appointment of a receiver for the common benefit of all creditors be made by this court.

Demurrers to the original bill and intervening petition of the policy-holders and to the petition of the receivers have been filed, presenting the question of the rights of the Iowa creditors to the assets in Iowa, and of the right of the receivers appointed in Connecticut to be heard in this court, and of their right to the possession or control of the assets of the company in Iowa. In the bill filed by complainants, and in the argument in support thereof, it is claimed that the creditors residing in Iowa have, by reason of such residence, a superior equity over non-resident creditors in and to the assets of the company found in Iowa, and, in support of the demurrer filed by complainants to the intervening petition filed by the receivers appointed in Connecticut, it is said that they are foreign receivers, and, as such, have no standing in the courts of Iowa, no authority to sue

therein, and no right in or control over the property of the insurance company situated in any other State than Connecticut; and that the courts of Iowa will not compel citizens of Iowa to seek protection in the courts of other States, by permitting or aiding foreign receivers to take possession of the assets of the company found in Iowa, and remove the same into another jurisdiction.

The chief authority relied on by counsel for complainants is the case of *Booth vs. Clark* (17 How., 322), in which, after a very full consideration of the authorities, the supreme court held that a receiver appointed under a creditors' bill, for the benefit of one or more creditors, to the exclusion of all others, has no power or rights beyond the territorial jurisdiction of the court appointing him, and that such court could not confer upon him authority to go into a foreign jurisdiction to take possession of the debtor's property, or to maintain suit therefor outside the jurisdiction appointing him. The facts out of which the contest arose in that cause were somewhat peculiar; but it is not necessary to state the details thereof further than to quote the statement by the supreme court that "this suit, then, is substantially between Hackett, as the assignee of Clark in bankruptcy, and Booth, the receiver under Camara's creditor's bill; that it may be determined by this court which of them has the official right to the Mexican fund, for the distribution of it between the creditors of Clark, or whether Booth, as receiver, shall have from that fund a sufficient sum to pay Camara's entire debt, leaving the residue of it for distribution between Clark's other creditors."

Booth had been appointed receiver upon a creditors' bill filed in New York. His title depended solely upon the order of the court appointing him, as the debtor Clark had not, either voluntarily or by compulsion, executed any conveyance of his property to such receiver. Hackett was an assignee in bankruptcy, appointed under proceedings in bankruptcy filed by Clark in the United States court in New Hampshire, under the provisions of the bankrupt law of the United States passed August 19, 1841. The supreme court held that, as against the assignee in bankruptcy, the receiver had no title or right to the property. In discussing the case, the court gives the rule as to the power and rights of ordinary receivers in terms broad enough to fully sustain the contention of complainants herein, and, if the facts of the present case were the same as in *Booth vs. Clark*, there would be no doubt of the rule to be followed. The conclusion reached in that case was that the assignee in bankruptcy, representing the rights of the general creditors, had the superior right

to the assets over the receiver representing one creditor only. In the present case the receivers appointed in Connecticut represent the general creditors, and the complainants their own claims only. If the latter are held to have the superior equity and right, then the few will be preferred over the many.

Again, it will be remembered that in *Booth vs. Clark* there was involved simply the question of the rights of creditors in and to the property of a single person. The case did not present the question of the rights and equities of creditors of a corporation. If the broad claim made on behalf of complainants, that creditors living in Iowa have the superior equity and right to the assets of the company found in Iowa, is well founded, the results, when applied to cases of insurance companies, will be most inequitable and unjust. A person living in Iowa, for instance, takes a policy upon his life, payable at his death, or under the endowment plan, payable in 15 or 20 years. When the policy is issued, a large part of the assets of the company is invested in Iowa property. In the progress of time the location of such investments is changed, the whole thereof being withdrawn from this State. The company becomes insolvent, and there are claims enough in the other States to absorb all the assets found in the several States. In such case, the Iowa creditors, under the rule advocated by complainants, would be wholly cut out from any participation in the proceeds of the assets of the insolvent company. Such a rule would also place it within the power of the managing officers of such companies, when they became aware of the probable insolvency of the corporation, to protect and prefer the policy-holders of one section or State at the expense of others holding equally meritorious claims, by concentrating the investments of the company in one or more States.

The doctrine enunciated in *Booth vs. Clark*, and the cases based thereon, was not intended to work out any such inequitable result. In other words, that case does not deal with the questions presented in cases of corporations of the character of the Charter Oak Life Insurance Company, in which the equities of policy-holders and other creditors are derived from radically different sources than in case of a claim against an individual debtor. The doctrine of *Booth vs. Clark* is that it is inequitable to permit one or a few creditors, by filing a creditors' bill, and having a receiver appointed by the court, to draw into that court for their benefit the assets of the debtor situated in other States or jurisdictions, thus depriving other creditors of the right to subject such assets to the payment of their

claims; and, in order to defeat the effort of the few to secure a preference over all others, it is held that a receiver appointed by a court at the suit of one or more creditors will not be heard to assert a right, as against other creditors, to assets situated beyond the territorial jurisdiction of the court appointing him. It was not, however, intended in such case to establish the proposition that, because there were creditors residing in the State, *ipso facto* they had the right to exclude all non-resident creditors from participating in the proceeds of the assets in such State.

In *Relfe vs. Rundle* (103 U. S., 222) is found the rule which is applicable to the present case. In that cause it appeared that the Life Association of America was a corporation organized under the laws of the State of Missouri, one of the provisions of which is that, upon the rendition of judgment dissolving a company or declaring it insolvent, all the assets of such company shall vest in fee-simple in the superintendent of insurance, to be by him disposed of for the benefit of the creditors and policy-holders of such company. In October, 1879, proceedings were commenced in Missouri for the purpose of having the association declared insolvent, and winding up its affairs under the statute. In November, 1879, Rundle and wife, who were policy-holders in the company, commenced suit in a Louisiana court for the purpose of having the assets of the association in Louisiana declared a trust-fund, and applied to the payment of the claims of the Louisiana creditors; and to that end, to keep such assets out of the hands of William S. Relfe, who was the superintendent of insurance of the State of Missouri. The case came before the supreme court upon the question of the right of removal to the Federal court, it being urged in opposition thereto that Relfe had no standing in the courts of Louisiana. It was held that Relfe was not an officer of the Missouri State court, but the person designated by law to take the property of any dissolved life insurance company of that State, and hold and dispose of it in trust for creditors; and that the law which clothed him with this trust was, in legal effect, part of the charter of the company; that he was an officer of the State, and his authority came, not from the decree of the court, but from the statute, and that he was, in effect, the corporation itself, for all the purposes of winding up its affairs. The court then proceeds to say:—

We are aware that, except by virtue of some statutory authority, an administrator appointed in one State cannot generally sue in another, and that a receiver appointed by a State court has no extraterritorial power. But a

corporation is the creature of legislation, and may be endowed with such powers as its creator sees fit to give. Necessarily it must act through agents, and the State which creates it may say who those agents shall be. One may be its representative when in active operation, and in full possession of all its powers, and another if it has forfeited its charter, and has no lawful existence except to wind up its affairs. No State need allow the corporations of other States to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but, if it does, without limitation, express or implied, the corporation comes in as it has been created. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it, everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs, both in life and dissolution. By the charter of this company, if a dissolution was decreed, its property passed by operation of law to the superintendent of the insurance department of the State, and he was charged with the duty of winding up its affairs. Every policy-holder and creditor in Louisiana is charged with notice of this charter right, which all interested in the affairs of the corporation can insist shall be regarded. The appellees, when they contracted with the Missouri corporation, implicitly agreed that, if the corporation was dissolved under the Missouri laws, the superintendent of the insurance department of the State should represent the company in all suits instituted by them affecting the winding up of its affairs.

The provision of the laws of Missouri in regard to the power and authority of the State superintendent of insurance is part of the general statutes of the State, but the supreme court, in the opinion just cited, treat it as being a part of the charter of every company organized in Missouri.

Turning, now, to the laws of the State of Connecticut, we find it enacted, that, if the insurance commissioner of the State shall find an insurance company organized under the laws of that State to be insolvent, "he shall bring a petition to the superior court of the county in which the principal office of such company is located, if in session; and, if not, to a judge of the supreme court of errors praying for the appointment of a receiver, and that the charter of the company may be annulled;" it being further provided that "the court or judge may appoint a receiver, make all necessary orders in reference to the delivery to and possession by such receiver of the assets and property of such company, and the sale and conveyance of the same by him, and may direct the application of the avails of such assets and property equitably, in satisfaction of the claims proved against such company, and the payment of the present value of its outstanding policies, either in whole or in part, or to the re-insurance of its outstanding policies in some solvent company," etc.

This is the mode and manner provided for the dissolution and winding up of the affairs of the company in case of insolvency, and, as stated in *Relfe vs. Rundle*, every policy-holder and creditor in Iowa is charged with notice thereof. In other words, when the complainants in Iowa took out policies of insurance in a Connecticut corporation, they took the same subject to the provisions of such charter; and they impliedly agreed that, in case of insolvency and dissolution under the laws of the State of Connecticut, they would be bound by the provisions of such laws, so far as the same form part of the charter of the company; and under the provisions of the charter and statutes of Connecticut, in case of insolvency, the court may decree the dissolution of the company, appoint a receiver, with power to take possession of and sell and convey all the assets of the company, and divide the proceeds equitably among all the creditors and policy-holders. So far as the rights of complainants are based upon the charter of the company, they have the right to insist, as against all other creditors, that the charter rights above named shall be carried into effect; and the other creditors have the like right to so insist, as against complainants. Neither the charter of the company, nor the laws of Connecticut, in any way provide that creditors or policy-holders residing in Iowa shall have prior right to, lien on, or equity in, the assets of the company found in Iowa, in case of a dissolution of the company, and no such provision is found in the policies issued to complainants.

Do the statutes of Iowa secure, or attempt to secure, any such superior right to its citizens? By section 1,164 of the Code it is provided that no person shall act as agent in Iowa for any insurance company organized in any other State unless it has been made to appear that such company has invested, in certain named kinds of securities, the amount of capital named, such stock and securities to be deposited with the auditor, comptroller, or chief financial officer of the State under whose laws the corporation is created, or some other State, to be by him held "in trust and on deposit for the benefit of all the policy-holders of such company."

The statutes of Iowa provide, as the essential condition to the admission of foreign companies into the State, that the capital stock and securities named shall be a trust-fund for the benefit of all policy-holders, and there is no provision of the statutes which provides that the Iowa creditors shall be given a preference over other policy-holders in the distribution of the assets in Iowa, in case of insolvency. The laws of Iowa, as well as those of Connecticut,

recognize the fact that "equality is equity," when the assets of the insolvent corporation are to be distributed. As there is not to be found in the statutes of Iowa any provision attempting to secure superior rights to Iowa creditors in the assets of the company situated in Iowa, and as the charter of the company does not confer such, it follows that, if the Iowa creditors have such superior right, it must be based upon the idea that the State recognizes the claims of Iowa citizens to property found in the State to be always superior to those of non-residents; and, if this be true, then, in all cases of administration of estates, assignments for benefit of creditors, creditors' bills, foreclosure of railroad and other mortgages, and in all other cases in which a court of equity is called upon to marshal assets and distribute the same, the superior equity of the citizens of Iowa must be recognized, and the equally meritorious claims of non-residents must be postponed until the Iowans are paid in full. The statement of the proposition ought to be its sufficient refutation.

When the assets and fund to be distributed is a common one, derived from the payments made by all creditors, as in case of an insurance company, the fact that part or the whole of the assets may be invested in any one State does not give to the creditors residing in such State a superior right thereto. As already stated, the charter of the Charter Oak Company secures to its policy-holders and creditors the right to an equitable participation in the assets of the company, in case of insolvency and dissolution. To bring about such equitable distribution of its assets, the charter and laws of Connecticut provide for the appointment of a receiver to take charge of the property of the company in case of its dissolution, and the duty imposed upon such receiver is not materially different from that imposed upon the State superintendent under the Missouri statute construed in *Relfe vs. Rundle*. For the purpose of collecting the assets of the company, he is the successor of the dissolved corporation. He is in fact a trustee, representing the interests of the stockholders and creditors of the company; deriving his authority not alone from the order of the court appointing him, but from the charter of the company and the statute of the State creating the corporation. To establish their rights as policy-holders, the complainants rely upon the provisions of the charter of the company, and, if the courts of Iowa can enforce the provisions of the charter and the rights conferred thereby in one respect, why not in another? The provisions of the charter estop the complainants, who, as policy-holders, are bound by its terms from denying the right of other pol-

icy-holders to an equitable participation in the assets of the company; and they cannot object to the enforcement of the method provided by the charter and laws of Connecticut, forming part thereof, for securing such equitable distribution in case of the dissolution of the corporation. An essential feature of such method is the appointment of a receiver, with power to take possession of all the assets of the company, wherever situated, and, when such receiver has been duly appointed in the mode provided for in the charter, the policy-holders cannot deny his authority.

The purpose of complainants is to defeat the equitable distribution of the assets of the company according to its charter, and to secure an unjust advantage to themselves, thereby violating the true meaning of the agreement entered into between themselves, as policy-holders, and the company; and they invoke the aid of a court of equity in so doing, upon the theory that the court cannot recognize a receiver appointed in a foreign jurisdiction. The rights of the policy-holders, however, are not dependent upon the latter proposition. Even if the Connecticut receivers could not maintain a right to the possession and control of the assets of the company in Iowa, that would not deny the rights of other policy-holders to a share in the proceeds thereof, and the question would then be how distribution should be made. The facts set forth in complainants' bill do not show that complainants have a superior equity in the assets in Iowa, but on the contrary, it appears that such assets are a part of a common fund, in which all the policy-holders have an interest.

The bill shows that proceedings have been instituted in the proper court in Connecticut for the final dissolution of the corporation, and for the distribution of its assets among all its creditors; and to that end receivers have been appointed, with authority to take possession of the assets of the company, sell the same, and distribute the proceeds equitably among the creditors; and, in order to prevent the assets in Iowa from being taken possession of by such receivers, and distributed as provided for by the charter of the company, this court is asked to keep possession by its receiver, and to distribute the same among the Iowa creditors, to the exclusion of all others. As already said, the complainants do not show that they have a superior right to the assets in possession of the court, but, on the contrary, all the policy-holders and creditors are equitably interested therein, and the property must be disposed of for the common benefit.

The petition filed by the receivers appointed in Connecticut asks that their right to the assets of the company may be recognized, and that the receiver heretofore appointed be discharged; that a receiver ancillary to the petitioners be appointed to take possession of the assets, convert the same into money, and to remit the proceeds to the petitioners for distribution in the proceedings pending in Connecticut. No objection to this mode of disposing of the assets is perceived, and the order will be made accordingly.

The demurrers to complainants' bill, and to the intervening petition of the several policy-holders, are sustained. The demurrer to the intervening petition of Brooks and Stedman, receivers, is overruled.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

FREEMAN

vs.

TRAVELERS' INS CO. OF HARTFORD.*

In an action upon an insurance policy in which the company insures against bodily injuries "effected through external, violent, and accidental means," the policy containing provisos that the insurance "shall not extend to any bodily injuries * * * where the death or injury may have happened in consequence of violent exposure to unnecessary danger, hazard, or perilous adventure," and that the policy is subject to the condition that "the party insured is required to use all due diligence for personal safety and protection," etc., *held*, that an employe of a railroad company who, while on the railroad track, was killed by a train, received bodily injuries through "external, violent, and accidental means," and that he did not expose himself to unnecessary danger by being upon the track, he having been sent there to shovel snow from the crossings, and that the burden of proof was upon the company to show that the insured did not use "all due diligence for personal safety and protection."

In an action upon a policy of insurance, it appeared that the insured was killed by being run over by a railroad-train, and the question raised was whether his death resulted from his own fault, or through that of the managers of the train. *Held*, upon the engineer of the train having given testimony tending to show that he saw the deceased on the track as soon as he could be seen from the engine, and that the train was stopped as soon as possible, that it was competent for the conductor of the train to testify, for the purpose of rebutting the testimony of the engineer, that the train might have been stopped sooner than it was, and that it could not be said that the conductor had not sufficient experience to justify the court in allowing him to so testify, although it did not appear that he had any particular knowledge as to the running of an engine.

Action to recover on a policy of accident insurance on the life of John J. Murray, payable to the plaintiff. At the trial in the superior court, before Bacon, J., it appeared that Murray was an employe on the Boston, Barre & Gardner Railroad, and was killed by a freight-train on that road December 26, 1883. No question was made as to sufficient and timely proof of death. Evidence was presented in

* Decision rendered, June 29, 1887.—From *Northeastern Reporter*.

support, and in disproof, of the defense set up that the deceased was intoxicated, which was submitted to the jury under instructions not excepted to, and which the verdict makes immaterial, except as the verdict establishes as a fact that he was not intoxicated, and as that fact may bear upon the issue of due care. The plaintiff offered evidence tending to show that the railroad was nearly straight for a long distance from the crossing towards the north, and that the planking on the crossing could be seen by a man standing on the track at a distance of about 90 rods from the crossing, and, if a man was elevated as high as the engineer would be in his cab, he could see said planking for a considerable distance further. There was evidence on the issue that the deceased was not in the exercise of due care for personal safety and protection at the time of the accident, as follows:—

Edward Doody testified that he was working on stoves, but was conductor on the said road on the morning of December 26, 1883, on the train that struck Murray, that he was on duty in his saloon-car, that he knew Murray, and had known him for a year; that the first he knew of the accident was the picking up of Murray just below Davis' Crossing, about three-fourths of a mile from Brooks Station; that he heard first a whistle for the crossing and then a whistle for brakes; that the first thing he saw after the train stopped was Murray lying behind the train on the right-hand side of the track coming towards Worcester; that soon the brakeman, fireman, and engineer came up, and, together with witness, picked Murray up and put him into the saloon-car; that Murray's legs appeared to be broken; that the train went on, and witness stayed with him in the saloon-car all the way; then he died on the train just a little above Barber's Crossing; that he was conscious all the time between the time witness first went to him and the time when he died. On cross-examination, Doody testified: "Murray said that he didn't want me to tell Mike Flanagan his foreman; that he didn't want Mike to know anything about." On cross-examination, Doody testified that when he first saw Murray it was after the whistle had sounded and the train had stopped; that the latter was lying beside the track, and had on a blue shirt and a dark coat. It had previously been proved that deceased went out that morning from Worcester on a passenger-train, and reported at Brooks Station to the section foreman, who sent him with his pick and shovel to clear the snow from the rail at crossings, the first crossing being Davis' Crossing a mile and a half south, where, in an hour or more, he was

killed. There were 10 or 12 inches of old snow on the ground, and there had been a fall of 3 inches of new light snow the preceding night.

A. W. Mitchell was called by the defendant, and testified that he was a locomotive engineer, and had run an engine nearly four and a half years; that he was engineer on the freight-train that struck Murray; that there was a light snow on the track of about three inches, and the track was slippery; that about 10:30 his train left Brooks Station, going south; that Davis' Crossing is one-half to one mile from Brooks Station, and it is down grade after leaving Brooks Station, so that the train runs without steam, under control of the brakes, running about 15 miles per hour; that he sounded his whistle at the whistling-post nearest the crossing, and, rounding a sharp curve, observed what he thought to be a coat on the snow. On getting closer saw a man as if lying on his face, feet towards the engine, his limbs covered with light snow. The coat did not seem to have much of any snow on it; that he whistled for brakes, and sounded the whistle for the man to get off; that he reversed the engine; that the man did not start, and the fireman applied the tender-brake. As the man was struck the clothing caught on the scraper, and threw him one side. One limb might have gone under the front wheel. The clothing held, and kept him from being thrown under and mangled, and drew him along quite a ways, and then threw him out one side; that after he was struck witness went back to him, and heard him say, "Don't tell Mike." On cross-examination, witness testified that, after rounding the curve mentioned, the crossing could not be seen until it was within a distance of 30 rods; that he would not swear that he could not see the crossing by standing on the engine-rail at a distance of 80 rods; that when he saw the crossing on the occasion in question he was about 20 rods away, and that as soon as he saw the man he instantly whistled for brakes and reversed the engine.

The plaintiff, for the purpose of showing that the engineer, Mitchell, was reckless, and that he unnecessarily ran over the deceased, called in rebuttal Doody, the conductor, and asked him the following question: "In your opinion how long a distance, as the train was going, would it go before it would stop if the appliances were used for stopping?" Defendant's counsel objected to the witness answering this question, on the ground that he was not qualified on that point, and also objected to the question. The objections were overruled, and Doody, in reply, said, "it depends upon the

brake-pumps;" and further testified that, according to the force that was on the front end of the train, it ought to have been stopped quicker than it was; and that it should have been stopped in from three to five minutes; that it would go 40 or 50 rods.

At the conclusion of the evidence defendant asked the court to instruct the jury "that there was no sufficient evidence in this case to warrant the jury in finding that the deceased was in the exercise of due diligence for personal safety and protection at the time of the injury, and that therefore the plaintiff cannot recover." This ruling was refused, and that issue was submitted to the jury, the court ruling that such due diligence or due care must be proved by the plaintiff affirmatively. The jury returned a verdict for plaintiff, and defendant alleged exceptions.

W. S. B. HOPKINS, *for Defendant.*

It is incumbent on the plaintiff to prove, in order to establish any case of liability on the part of the defendant, that the insured came to his death by "external, violent, and accidental means" while he was in the exercise of due care: Drummond, J., in *Tooley vs. Railroad*, 3 Biss., 399; *Morel vs. Mississippi Val. Life Ins. Co.*, 4 Bush., 535; *Theobald vs. Railroad P. Assur. Co.*, 10 Exch., 44; *Brown vs. Railroad P. Assur. Co.*, 45 Mo., 221; *Schneider vs. Provident Life Ins. Co.*, 24 Wis., 28; *May, Ins.*, § 530. See *Prentiss vs. Boston*, 112 Mass., 43, 47; *Mayo vs. Boston & M. R. R.*, 104 Mass., 137, 140. And see *Hinckley vs. Cape Cod R. R.*, 120 Mass., 257, 262, 263; *Crafts vs. Boston*, 109 Mass., 519; *W. Allen, J.*, in *O'Connor vs. Boston & L. R. R.*, 135 Mass., 352, 361. Although in *Hinckley vs. Cape Cod R. R.*, there was a dissenting opinion, the dissent was not to the proposition that an utter absence of evidence of conduct allows nothing to be inferred for the plaintiff. Though the rule may work to the great misfortune of a plaintiff, it must prevail: "Whether the absence of evidence results from fault, or is only the misfortune of the plaintiff, is immaterial to the decision of the question of law:" *Crafts vs. Boston*, 109 Mass., 519, 521. See, also, *Nelson vs. Chicago, R. I. & P. R. R.*, 38 Iowa, 567. But the case at bar is stronger against the plaintiff than where, all the circumstances being proved, there is an "absence of all appearance of fault;" stronger than the illustration where a man "had not been seen by any one from the time he started from his home until he was found lying on the ground," etc. See *Mallory vs. Travelers' Ins. Co.*, 47 N. Y., 52. The position of the deceased was *prima facie* evidence of negligence. The declarations

of the deceased immediately after the accident was evidence tending to show consciousness of negligent conduct on his part; at all events, it was not evidence of due care. The case is distinguishable from *Smith vs. Boston Gas-Light Co.*, 129 Mass., 320; *Com. vs. Boston & L. R. R.*, 126 Mass., 61; *Prentiss vs. Boston*, 112 Mass., 43. Our contention is not only that Doody, the conductor, had not sufficient skill to pass an intelligent judgment on that concerning which he was asked his opinion, but that the evidence shows that from his position and duty, he was not acquainted with facts enough to warrant the court in permitting him to testify.

F. P. GOULDING and W. H. ATWOOD, *for Plaintiff*.

The defendant's request for a ruling "that there was no sufficient evidence to warrant the jury in finding that the deceased was in the exercise of due diligence," etc., was rightly refused: See 1 Greenl. Ev. (13th Ed.), § 49, note 1, p. 64; *Michell vs. Williams*, 11 Mees. & W., 216, 217. For it is only where there is an entire absence of any facts to authorize the inference that the plaintiff was conducting himself with reasonable prudence and discretion, or the undisputed facts of the case prove actual negligence, that a case like the present should be withdrawn from the consideration of the jury: *Fox vs. Sackett*, 10 Allen, 535; *Copley vs. New Haven & N. Co.*, 136 Mass., 6; *Reed vs. Inhabitants of Deerfield*, 8 Allen, 522; *Chaffee vs. Boston & L. R. R.*, 104 Mass., 115; *Gaynor vs. Old Colony & N. R. R.*, 100 Mass., 212; *French vs. Taunton Branch R. R.*, 116 Mass., 537; *Craig vs. New York, N. H. & H. R. R.*, 118 Mass., 437; *Tyler vs. New York & N. E. R. R.*, 137 Mass., 238. The evidence offered by plaintiff was sufficient to entitle plaintiff to go to the jury upon the question whether he "sustained bodily injuries effected through external, violent, and accidental means:" *Trew vs. Railway Pass. Assur. Co.*, 6 Hurl. & N., 839; *Mallory vs. Travelers' Ins. Co.*, 47 N. Y., 52.

The plaintiff had a right to go to the jury on the question whether Mitchell's evidence was not wholly false and fictitious. The condition first in the policy is a condition subsequent; something which may defeat the contract after it attaches. It is therefore matter of confession and avoidance, and the defendant must plead and prove the deceased violated the condition. The instruction of the court was too favorable to the defendant. Negligence, or want of due care, is not a defense: *May, Ins.*, §§ 530, 531; *Providence Life Ins. Co. vs. Martin*, 32 Md., 310; *Stone vs. U. S. Casualty*

Co., 34 N. J. Law, 371. The question was not whether there was sufficient evidence to prove affirmatively that the deceased used all due diligence for personal safety and protection, but whether the jury might find that the defendant had failed to prove that the deceased violated this condition of the policy. The defendant pleaded this condition, and it was necessary for it to prove it: *Stearns vs. Barratt*, 1 Pick., 443; *Mulry vs. Mohawk Val. Ins. Co.*, 5 Gray, 541. The necessity of proof rests on each party according to the material averments of his pleadings: *Jones vs. Andover*, 10 Allen, 18; *Haskins vs. Hamilton Ins. Co.*, 5 Gray, 432; *Goss vs. Austin*, 11 Allen, 525; *Lamson & Goodnow Manuf'g Co. vs. Russell*, 112 Mass., 387; *Forbes vs. American Ins. Co.*, 15 Gray, 249. The evidence of Doody in rebuttal was competent. See *Perkins vs. Stickney*, 132 Mass., 217; *Nunes vs. Perry*, 113 Mass., 274, 276; *Hawks vs. Charlemont*, 110 Mass., 110. It was competent for the plaintiff to show any of the facts connected with the stopping of the train, and the time when she should show them was not matter of exception. See *Tucker vs. Massachusetts Cent. R. R.*, 118 Mass., 546. Everything which goes to affect the credit of a witness as to particular facts to which he is called to testify, is material and admissible: 1 Greenl. Ev. (13th Ed.), § 449, note 7; *Com. vs. Hunt*, 4 Gray, 421.

FIELD, J.

The policy insures J. J. Murray against bodily injuries "effected through external, violent, and accidental means, within the intent and meaning of this contract, and the conditions hereunto annexed," etc. After the principal clause of the policy there follow five provisos and eight conditions. The second proviso is: "Provided, always, that this policy is issued and accepted subject to all the provisions herein contained or referred to," etc. The third proviso is "that this insurance shall not extend to any bodily injury * * * when the death or injury may have happened in consequence of * * * voluntary exposure to unnecessary danger, hazard, or perilous adventure," etc. The conditions are introduced by the following clause: "Claims under this policy are payable only at the company's office in Hartford, and this policy is subject, also, to the following conditions." The first condition is: "The party insured is required to use all due diligence for personal safety and protection, and to notify the agent writing this policy, immediately and in writing, of any 'change from the occupation, profession, or employment under which this insurance is granted,' etc.; and by the last condition: "The provisions and conditions aforesaid, and a strict com-

pliance therewith during the continuance of the policy, are conditions precedent to the making of this contract." This last condition cannot take effect universally, because many of the provisos and conditions relate to matters which must happen, if at all, after the making of the contract.

Clearly, there was evidence for the jury that Murray received bodily injury, through external, violent, and accidental means, and that he did not voluntarily expose himself to unnecessary danger. He was rightfully upon the railroad-track, under his employment. The questions involved in the exceptions are whether the burden of proof was on the plaintiff to show that Murray used "all due diligence for personal safety and protection," and whether there was sufficient evidence for the jury to warrant them in finding this as a fact. A majority of the court is of opinion that the burden was on the defendant to show that Murray had not used all due diligence for his personal safety and protection. So far as this first condition is concerned, the policy means that the company insures Murray against bodily injuries effected through external, violent, and accidental means, provided, however, and subject to the condition, that the amount insured shall not be payable unless Murray uses "all due diligence for personal safety and protection." The defendant's liability is to be determined by the contract, independently of the special provisions of the contract. Contributory negligence on the part of Murray would not be a defense; and, by the use of the word "accidental," injuries to which the negligence of Murray contributed are not excluded from the protection of the policy: *Schneider vs. Provident Life Ins. Co.*, 24 Wis., 28; *Trew vs. Railway Pass. Assur. Co.*, 6 Hurl. & N., 839; *Providence Life Ins. & Investment Co. vs. Martin*, 32 Md., 310; *Stone vs. U. S. Casualty Co.*, 34 N. J. Law, 371.

In *Sohier vs. Norwich Fire Ins. Co.* (11 Allen, 336), after the description of the property insured against fire, this clause was inserted: "This policy not to cover any loss or damage by fire which may originate in the theater proper." It was held that the burden was on the plaintiff to show a loss not originating in the theater proper. The court say that "if that clause can be regarded as a proviso, that is, a stipulation added to the principal contract, to avoid the defendant's promise by way of defeasance or excuse, then it is for the defendant to plead it in defense and support it by evidence. But if, on the other hand, it is an exception, so that the promise is only to perform what remains after the part

excepted is taken away, then the plaintiff must negative the exception, to establish a cause of action. It is not always easy to determine to which class, whether of proviso or exception, a particular stipulation belongs; and this one is certainly very near the line." The court held it to be an exception; saying that "the provisos are set forth together in a different part of the instrument."

In *Kingsley vs. New England Mut. Fire Ins. Co.* (8 Cush., 393) the policy recited that the Kingsleys had paid the premium, etc., for insuring their paper-mill, "on condition that the applicants take all risks from cotton-waste;" in consideration whereof the company insured the property in the sum of \$2,000. The court held that the "burden" was not on the plaintiff to show that the loss occurred from some other way than from cotton-waste; that the clause was not an exception, but a proviso; and that the defendant must set it up in defense, and support it by evidence.

The rule of pleading in declaring upon a contract which contains an exception, or a proviso, or a condition, is stated in *Com. vs. Hart* (11 Cush., 130, 134), as follows: "If such instrument contains in it, first, a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something that would otherwise be included in it, a party relying upon the general clause, in pleading, may set out that clause only, without noticing the separate and distinct clause which operates as an exception; but, if the exception itself be incorporated in the general clause, then the party relying on it must, in pleading, state it, together with the exception." It is a general rule of the law of evidence that it is necessary for a party to prove the substantive facts which he is required affirmatively to aver in his pleading.

It is true that this policy only insures against bodily injuries effected by the means described, "within the intent and meaning of this contract, and the conditions hereunto annexed," but this does not change the nature of the conditions. They still take effect as conditions, and the insertion of these words in the principal clause of the contract does not vary the legal effect of the contents. The condition we are considering is essentially an executory stipulation, in the form of a condition, that Murray shall use all due diligence for his personal safety and protection, and it is the breach of this condition by Murray which defendant sets up as a defense. We are not aware that it has ever been held that the introduction of the words we have quoted, or of other similar words, into the principal clause of a policy of insurance, incorporates into this clause the

conditions of the policy, within the meaning of the rule of pleading we have stated; and in some of the decisions where it has been held that the defendant must plead, or that the burden of proof was on him to show that a representation was false, or that a stipulation contained in a condition had not been complied with, the policy contained these or similar words in the principal clause. Every case depends upon the nature of the stipulation or condition, as well as upon the form of it. This condition does not differ in its character from the provision in life insurance policies that they shall be void, or that the amount insured shall not be payable, if the assured shall die by his own hand. The burden of proving the breach of such a provision is on the company, and we think that the ruling in the present case upon the burden of proof was erroneous: *Haskins vs. Hamilton Mut. Ins. Co.*, 5 Gray, 432; *Daniels vs. Hudson River Fire Ins. Co.*, 12 Cush., 416, 426; *Pierce vs. Cohasset Mut. Fire Ins. Co.*, 123 Mass., 572; *Mulry vs. Mohawk Val. Ins. Co.*, 5 Gray, 541; *Hodsdon vs. Guardian Life Ins. Co.*, 97 Mass., 144; *Cluff vs. Mutual Ben. Life Ins. Co.*, 13 Allen, 308, 99 Mass., 317; *Jones Manuf'g Co. vs. Manufacturers' Fire Ins. Co.*, 8 Cush., 82; *Orrell vs. Hampden Fire Ins. Co.*, 13 Gray, 431; *Redman vs. Aetna Ins. Co.*, 49 Wis., 431; *Grangers' Life Ins. Co. vs. Brown*, 57 Miss., 308; *Germain vs. Brooklyn Life Ins. Co.*, 30 Hun, 535; *Campbell vs. New England Mut. Life Ins. Co.*, 98 Mass., 381.

In an action upon a policy which contains many provisos and conditions there is a practical wisdom, which courts have recognized, in compelling the insurance company to allege and prove the want of compliance with any particular proviso or condition on which it relies: *Piedmont Life Ins. Co. vs. Ewing*, 92 U. S., 377.

The court refused to rule that there was not sufficient evidence to warrant the jury in finding that Murray used due diligence, and to this the defendant excepted. It is evident that this refusal has not harmed the defendant, because the burden of proof was on the defendant.

We cannot say that the witness Doody had not sufficient experience to justify the court in permitting him to answer the questions asked. The answers had some tendency to show that the defendant's witness, Mitchell, had not testified correctly, and that he had not exercised due care in stopping the train, and they had, perhaps, some relevancy to the matter of dispute, which was whether Murray was injured through his own fault, or that of the managers of the train. Exceptions overruled.

COURT OF APPEALS OF MARYLAND.

Appeal from Superior Court, Baltimore City.

PRESIDENT & DIRECTORS OF THE FIREMEN'S
INS. CO. OF BALTIMORE

vs.

FLOSS AND OTHERS.*

A firm consisting of two members insured their stock against fire, and subsequently introduced another member, but without changing the name of the firm. The policy was under seal, and provided "that this insurance shall continue and be in force * * * so long as the said assured, or their assigns, shall continue to pay the like premium as hath been paid for this insurance; provided, that a premium for a continuance of the insurance shall be actually paid by the assured, or their assigns, * * * and * * * a receipt therefor given by this corporation." Renewal premiums were duly paid by the firm, and renewal receipts taken therefor, until April, 1886, when a fire occurred.

Held, That the covenant in the policy contemplated the continuance or extension of the contract of insurance from year to year as a specialty, and the payment of the yearly premiums so continued it. The incoming member of the firm, not being a party to the deed, could not be joined as a plaintiff in the action, nor could assumpsit be maintained by the original firm for the loss sustained.

The same firm held another policy from the same company, obtained under similar circumstances, which policy did not contain a covenant for continuance or extension, but expressly declared that it should only continue for one year.

Held, That the policy, as a specialty, did not admit of an extension, but that the renewal receipts constituted distinct parol contracts referring to and incorporating the terms of the original policy. The absence of notice to the insurance company of the change in the firm did not affect the validity of the last of such contracts, which must be held to have been made with all the partners, and enforceable by them in an action of assumpsit.

By one of the conditions in the policies, the parties insured were required to render to the company within a reasonable time, "a full and particular account of their loss, to be signed by their own hands, and verified by their oath and affirmation." Only one of the parties signed and verified

* Decision rendered, June 22, 1887. —From *Atlantic Reporter*.

the particulars. The company did not object to the sufficiency of the particulars until after action brought, and in the first instance based their refusal to pay upon other grounds.

Held, That they had waived any objection to the sufficiency of the particulars.

G. H. WILLIAMS and I. H. THOMAS, *for Appellants*.

I. H. HALL, *for Appellees*.

ALVEY, C. J.

The two appeals, though in separate records, by and against the same parties, were argued together, and they will be considered together, as the records in both cases present substantially the same state of facts, and upon which the same questions were raised in the court below. The plaintiffs below, the appellees here, constituting a partnership under the name of S. W. Floss & Co., composed of S. W. Floss, Henry M. Adler, and Benjamin Cohen, and being the holders of two policies of fire insurance issued by the defendants, the present appellants, sued the latter in two several actions of assumpsit upon two several renewal receipts, by which receipts, as it is alleged, new contracts of insurance were made, subject to the same terms and conditions as the original contracts of insurance stated in the policies. Both policies were issued under the corporate seal of the defendants, but the renewal receipts for premiums paid were not under seal. The first policy, No. 49,730, was issued on the sixteenth of April, 1877; and the second, No. 51,716, was issued on the fifteenth of April, 1878. The policies were each for an insurance of \$2,500 on a stock of goods for one year. Other policies in other companies were held on the same stock of goods at the time of the fire, which occurred on the thirtieth of April, 1886; the aggregate amount of all insurance being about \$75,000. The total amount of loss according to estimate, was \$98,265.58. Notice and preliminary proofs of loss were furnished by the plaintiffs to the defendants on the eighth of May, 1886. The defendants refused payment, and the plaintiffs brought these actions.

The cases were tried on pleas of "never promised as alleged," "never indebted as alleged," and some others, alleging fraud, and failure to furnish legal preliminary proofs of loss, such as required by the conditions of the policies. On the trial, the policies, with the several annual renewal receipts attached thereto, were read in evidence. The last of such receipts, attached to policy No. 49,730, is dated April 16, 1886; and the last, attached to policy No. 51,716 is dated April 21, 1886. It was then admitted that, at the date of

the policies, the firm of S. W. Floss & Co. consisted of S. W. Floss and Henry M. Adler, and that it was not until the thirteenth of January, 1882, that Benjamin Cohen became a member of the firm, and that he has continued a member ever since. The preliminary proofs of loss furnished by the plaintiffs were called for by them, and put in evidence. In both cases, at the close of the evidence, the defendants submitted two propositions for instruction to the jury: (1) That there was no sufficient evidence of any contract between the defendants and the plaintiff Benjamin Cohen, as one of the members of the firm of S. W. Floss & Co., to entitle the plaintiffs to maintain the action, and that the verdict should be for the defendants; (2) that there was no sufficient evidence that the conditions of the policy in respect to preliminary proofs of loss, were complied with before the institution of the suit, or that the defendants had waived the right to object to such non-compliance.

1. Policy No. 49,730 contains a covenant of the defendants for the payment of the amount insured if the loss or damage insured against was sustained within the term of one year from the date of the policy, which would expire at noon on the sixteenth of April, 1878; and the defendants further covenanted, promised, and agreed to and with the assured, their executors, administrators, and assigns "that this insurance shall continue and be in force, from the expiration of the time before mentioned for its duration, so long as the said assured, or their assigns, shall continue to pay the like premium as hath been paid for this insurance, and so long as this corporation shall agree to accept and actually receive the same from the assured or their assigns; provided, that a premium for a continuance of the insurance shall be actually paid by the assured or their assigns, to this corporation before the day limited for the termination of the risk, and such payment indorsed on this policy, or a receipt therefor given by this corporation." The insurance was regularly continued by the annual payments of such premiums as the defendants thought proper to demand, and renewal receipts given as required by the policy. All the receipts are in the same form, and the last given reads thus:—

BALTIMORE, April 16, 1886.

Renewal Receipt for Policy No. 49,730, Subject to Conditions Therein.

Received \$15 from S. W. Floss & Co., being the premium on twenty-five hundred dollars on merchandise (as per policy) situate at 318 W. Baltimore Street, insured by the Firemen's Insurance Company, which is hereby continued in force, and will terminate at 12 o'clock noon on the 16th day of April, 1887.

This receipt was regularly signed by the clerk of the company, though not under seal.

It is an established principle that, where the action is by several plaintiffs, they must prove, either an express contract by the defendants with them all, or the joint interest of all in the subject of the suit. If the contract be with a partnership, it must appear that all who sue were partners at the time of making the contract; for one who has been subsequently admitted as a partner cannot join in the action, though it were agreed, as between the partners themselves, that he should become equally interested with the others in all the existing property and rights of the firm, unless, after the accession of the incoming partner, there has been a new and binding promise to pay to the firm as newly constituted: *Wilsford vs. Wood*, 1 Esp., 182, 183; *Ord vs. Portal*, 3 Camp., 240, note; *Ege vs. Kyle*, 2 Watts, 222; *McGregor vs. Cleveland*, 5 Wend., 475; 2 Greenl. Ev., § 478. And this principle applies with great strictness where the contract is by specialty; for no one can be joined in an action thereon as plaintiff who is not a party thereto, or the representative of such party. The question, therefore, is whether the policy No. 49,730, executed by the defendants under seal, and to which Cohen was not a party, constitutes the contract of insurance existing at the time of the loss, or whether the last payment of premium, and the renewal receipt, constitute a new contract of insurance not under seal, and to which Cohen was a party, with reference to the previous policy, for the purpose only of making such new contract subject to the terms and conditions set out in such policy. If the policy has been continued, or attempted to be continued, as the subsisting contract of insurance, Cohen, not being a party thereto, could not be joined in the action as co-plaintiff, nor could assumpsit be maintained by the partnership, as it existed at the date of the policy, for the loss sustained. And, looking to the terms of the covenant in the policy providing for the continuance or extension of the original contract of insurance and keeping the policy in force, we are of opinion that this action cannot be sustained.

This case, so far as the right to maintain the action is concerned, is not distinguishable from the case of *Baltimore Fire Ins. Co. vs. McGowan*, 16 Md., 47. In that case the policy under seal was for one year from its date, and contained a precisely similar covenant for the continuance in force of the insurance, from the expiration of that time, as that contained in policy No. 49,730, which we have recited. The renewal receipt was also in substantially the same

terms as the renewal receipts attached to the policy here. There, at the date of the policy, the firm of J. McGowan & Sons consisted of three persons, and at the date of the renewal receipt it consisted of only two, one of the members having in the mean time retired, and it was held by this court that the renewal receipt, taken under the covenant in the policy, was not a parol new contract of insurance with the remaining members of the firm, upon which an action of assumpsit could be brought, but that the covenant in the policy contemplated the continuance or extension of the contract of insurance from year to year as a specialty, and not as a parol new contract of insurance, to be evidenced by the renewal receipt, and therefore an action of assumpsit could not be maintained. That is exactly the case here, with the difference only that in McGowan's case a member of the firm had retired without change in the name of the firm, while in this case, before the last renewal, there had been an accession of a new member without a change in the name of the firm; so that neither in McGowan's case nor in this were the members of the partnership the same at the time of the last renewal as when the policy was issued. It is, however, very clear, that all the renewal receipts attached to the policy were given and accepted under the covenant in the policy, and with a view to a continuation or extension of the original contract of insurance as therein set forth. This is so expressly declared on the face of the receipts, and it was with that understanding, and with a view to such being the case, that the plaintiffs made up and furnished their preliminary proofs of loss. There was, therefore, no new contract entered into by paying the premiums and taking the renewal receipts. That was the construction in the McGowan case, and that decision has been recognized as a binding authority in subsequent cases in this court: *Mutual Fire Ins. Co. vs. Deale*, 18 Md., 52; *Shertzer vs. Mutual Fire Ins. Co.*, 46 Md., 510. And such being the case, it follows that there was error in refusing to grant the defendant's first prayer in the case based upon the renewal receipt attached to policy No. 49,730.

The other case, brought upon the last annual renewal receipt attached to policy No. 51,716 as a parol contract of insurance, is governed by a different principle from that of the preceding case. Here the original policy contains no such covenant for extension from year to year as that contained in policy No. 49,730. The policy simply provides that the insurance should continue for the term of one year from its date, and expressly declares that it should continue no longer. The policy, therefore, as a specialty, did not admit of a

continuation or extension from year to year by any mere parol contract. The renewal receipts attached are all in the same form, and refer to the policy by number, and declare on their face that the insurance was thereby continued in force for the ensuing year. But these receipts, not being under seal, could not have the effect of re-executing the policy, and continuing it in force as a specialty, for the several periods covered by the receipts. The receipts must be taken as evidence of new parol contracts for insurance made with reference to the pre-existing policy, and subject to the terms and conditions therein contained. Such receipts are both contracts and receipts; and, so far as they are treated as contracts, they are regarded as having been made upon the same considerations and representations as the original contract embraced in the policy referred to; and, whenever any changes are intended to be made in the terms or conditions of the original contract, such changes should be expressed in the renewal receipt. This is the principle as settled by numerous cases upon the subject, and this court has fully recognized that principle in the cases of *Mutual Fire Ins. Co. vs. Deale*, 18 Md., 52, and *Shertzer vs. Mutual Fire Ins. Co.*, 46 Md., 510.

It is insisted, however, that the defendants should not be held bound, even though the contract is evidenced by the renewal receipt, and therefore to be treated as a parol contract of insurance, because of the want of notice of the fact that the firm of the plaintiffs had been changed, by the introduction of Cohen as a partner, since the issue of the original policy. But to this we cannot accede. We know of no principle that requires, or authoritative case that holds, that notice in such case should be shown as a condition upon which the plaintiffs could recover. It is not shown nor pretended that there was any misrepresentation on the part of the plaintiffs as to the membership of the firm; nor is it pretended that the defendants were misled or deceived in any respect in regard to the composition of the partnership. The parol contract of insurance sued upon was made with the firm of S. W. Floss & Co., and that "partnership name" represented all the members of the partnership at the date of the contract, and the defendants must be taken to have contracted with the partnership as then constituted. Any other principle would lead to the greatest uncertainty and difficulty in the dealings as between the partnership and third parties. Moreover, by the terms of the original contract, to which the subsequent parol contract is made subject, assignment of that contract, or of an interest therein, was permissible, with the consent of

the insurance company; and the new parol contract made with the existing partnership for a continuance of the risk must be construed as consent given on the part of the defendants to accept Cohen, the incoming partner, as one of the assured. In this case, therefore, the court below was correct in refusing the first prayer of the defendants.

2. The next question raised relates to the preliminary proofs of loss, alleged to be defective for non-compliance with the requirements of the contract. The statement of particulars of loss was signed and sworn to by Alder alone, one of the firm, the other two partners failing to sign or swear to such statement. By one of the conditions of the policies in these cases, parties insured are required to render to the company, within a reasonable time, a full and particular account of their loss, and such statement "to be signed by their own hands, and verified by their oath or affirmation." Whether this provision requires, in all cases and under all circumstances, each and every person interested in a loss covered by the policy to sign and swear to the preliminary statement of loss, is a question not free of difficulty, but which we need not decide in this case; as we are clearly of opinion that the right to take advantage of any defect or irregularities in such preliminary statement or proofs of loss has been waived by the defendants. The fire occurred on the thirtieth of April, and the statement of loss was furnished on the eighth of May following. The receipt of this statement of loss was acknowledged by the defendants by letter dated the twenty-ninth of May, 1886, in which the plaintiffs were informed that the company was not then prepared to say whether the statement was satisfactory, or if unsatisfactory, in what respect. It is not shown that any objection whatever was taken, before suit brought, to the statement for what are alleged as defects therein; but, on the contrary, the refusal to pay was placed on totally different ground. So late as July 12th, Adler, one of the plaintiffs, called upon the president of the defendant company, and demanded payment of the alleged amount to be due, when he was informed by the president that the company would not pay, because, as he declared, the loss was unquestionably occasioned by an incendiary fire. If defect in preliminary proof had been made the ground of objection to payment, the supposed defect should have been pointed out, so that the plaintiffs could have had an opportunity to make the necessary correction. Good faith requires of an insurance company frank and open dealing with the assured, and, if there be any withholding or failure to disclose objections to preliminary proofs

beyond a reasonable time after they are furnished, or if refusal to recognize the obligation to pay be placed upon other and distinct grounds than alleged defects in preliminary proofs; the company will be regarded as having waived all objection that could otherwise have been taken to such preliminary proofs as furnished. Here the failure to make known the objection, notwithstanding the lapse of time; the fact that the defendants had themselves, with others, instituted an investigation into the circumstances and extent of the loss, and the placing the refusal to pay upon other and distinct grounds than the want of sufficient preliminary proofs,—furnish the amplest ground for holding all objection to such proofs to have been waived by the defendants. If authorities for this proposition be needed, it is only necessary to refer to *Allegre vs. Maryland Ins. Co.*, 6 Harr. & J., 408, 412, 413; *Frederick Ins. Co. vs. Deford*, 38 Md., 404; *Rokes vs. Amazon Ins. Co.*, 51 Md., 520; *Insurance Co. vs. Engle*, 52 Md., 482; *May, Ins.* (2d Ed.), §§ 468, 469. It is therefore clear the court below committed no error in refusing to grant the second prayer of the defendants.

Upon the whole, result is that the judgment of the court below in the case No. 21 on the docket of this court must be affirmed; and the judgment of the court below in the case No. 22 on said docket must be reversed without award of new trial.

UNITED STATES SUPREME COURT.

*In Error to the Circuit Court of the United States for the Northern
District of New York.*

TRAVELERS' INS. CO. OF HARTFORD, CONN.,

vs.

EDWARDS.*

The policy required that notice of death should be immediately given in writing to the home office by the assured or his representatives, and proofs within seven months. The agent who procured the risk notified the company in place of the representatives, and was supplied by the secretary with blanks for proofs.

Held, That the company, by its dealings with the agent, authorized the latter to receive the proofs, and was responsible for any delay occasioned by him.

SOLOMON LINCOLN, *for Plaintiff in Error.*

W. N. COGSWELL and W. F. COGSWELL, *for Defendant in Error.*

MILLER, J.

This is a writ of error to the circuit court of the United States for the Northern District of New York. The defendant in error, Catherine L. Edwards, obtained a judgment in the circuit court for the sum of \$5,387.50 against the Travelers' Insurance Company of Hartford, Connecticut, on a policy of insurance upon the life of her brother, Frank Edwards. The suit was originally instituted in the supreme court for Ontario County, New York, from whence it was removed by the plaintiff in error into the circuit court of the United States for that district. The record of a long trial before a jury is

* Decision rendered, May 27, 1887.

presented to us in a stenographic report of the proceedings there, which has been adopted by the parties and by the judge trying the case as a bill of exceptions. It is obvious from this paper that the main controversy before the jury was upon a question of suicide set up by the defendant company, but the brief of the plaintiff in error, and his assignment of errors, eliminates all this, and relies upon the defense stated by the brief in the following language: "Trial was had before a jury, and a verdict was rendered for the plaintiff, and the questions now arising are whether the plaintiff below complied with those conditions of the policy which required written notice to the company of the death of the deceased, and proofs of the same within seven months thereafter; whether the action was prematurely brought by reason of the plaintiff's failure to comply with such conditions of the policy before bringing suit; and whether certain details of evidence bearing upon the foregoing questions were properly admitted against the objection of the company."

The assignments of error correspond with this statement, and are given verbatim, as follows: "The circuit court erred (1) in that it admitted testimony relating to the acts and statements of Mr. E. M. Phillips, the local agent of the insurance company at Southbridge, Mass., with reference to the notice of death to be given by the defendant in error to the insurance company, and the delivery and reception of the proofs of death, as binding the company and affecting the rights and duties of the parties to the contract of insurance, it not appearing that Phillips had authority to represent or bind the company in this regard. Record 22, 23, 28, 29, 58, 77. (2) In that the court charged the jury as follows: 'If, upon this evidence, you find that upon the third of July, or during the seven months limited by the contract, the proofs of death which have been referred to were served upon Mr. Phillips, who was held out by this company to be its agent, under the circumstances detailed in this case,—that is, if you believe that he stated to the representatives of this assured that the proofs were to be left with him, and served upon him, and not upon the company,—then I say, for the purposes of this case, that that was sufficient service upon the company, within the provisions of the contract.' Charge, 79. (3) In that it refused to rule that the defendant in error had not furnished evidence of the notice of death required by the policy, inasmuch as there was no evidence that any notice in writing was given to the company after the death of Edwards, or that proofs of death were furnished to or served upon the company, and within seven months of his death, as required by

the policy. Pages 29, 77, 78. (4) In that the court declined to charge the jury as follows: 'That, under the undisputed evidence in this case, the jury must find a verdict for the defendant under the facts alleged in the second separate answer.' Page 82; Second Separate Answer, 3. (5) In that it refused to rule that the suit was prematurely brought, because the plaintiff below had not at the time furnished due notice and proofs of death as required by the policy, and ninety days thereafter had not elapsed. Page 78."

The language of the policy upon this point is as follows: "That, in the event of the death of the person insured, then the party assured, or his or her legal representatives, shall give immediate notice in writing to the company at Hartford, Conn., stating the time, place, and cause of death, and shall within seven months thereafter, by direct and reliable evidence, furnish the company with proofs of the same, giving full particulars, without fraud or concealment of any kind."

The answer of the defendant alleges that the plaintiff did not give to the defendant at Hartford or elsewhere, immediate notice in writing of the death of the said insured; and that defendant did not receive from said plaintiff notice of the death of the said Frank Edwards until the tenth day of February, 1883, his death occurring on June 19, 1882; and that the plaintiff did not, within seven months after the last-mentioned date, give notice in writing to the defendant at Hartford or elsewhere, nor in the manner and form as required by the policy, and has not delivered to or furnished the defendant with proofs of the death of said Frank Edwards with full particulars, but, on the contrary, failed and neglected so to do.

The evidence on this subject shows substantially that Phillips was the agent at Southbridge, Massachusetts, of the defendant corporation; that the application on which the policy issued was forwarded by Phillips to Hartford, the policy returned to him, and by him delivered to Edwards; that the receipt for the premium, signed by Rodney Dennis, secretary of the company, declared in the body of it that the policy would "not be valid until the above-stated premium has been received during the lifetime of said Frank Edwards, and this receipt countersigned by E. M. Phillips, agent of this company at Southbridge, Mass." On the margin of the receipt was the statement that "the agent who receives the within premium should countersign this receipt, and invariably state over his signature the date at which the payment is made to him." Across its face was written: "The within premium received and this receipt counter-

signed by me this twenty-fourth day of May, 1882. E. M. Phillips, agent at Southbridge, Mass." It was further indorsed: "All policies and agreements made by this company are signed by its president or secretary. No other person can alter or waive any of the conditions of the policies, or issue permits of any kind, or make agreements binding upon said company. Rodney Dennis, secretary."

The evidence further shows that, on the day after the death of Edwards, a gentleman named Bartholomew, who was a friend, and probably the attorney of the family, met Mr. Phillips in the Street; that Phillips said to him in regard to Edwards, whose death was then just known, that he was insured in the Travelers' Life Insurance Company, and that he (Phillips) was going to Hartford. The witness Bartholomew testifies: "I asked him if that was so. I didn't at that time know that he had a policy in that company. He said he was going to Hartford, and would give to the company the notice of his death, and would procure the blanks for the proofs of loss. I asked him if it would do as well for him to give the notice to the company in that way as for any party interested. He said it would, and I think that was all that was said then; saw Mr. Phillips some days after that; met him somewhere in the street,—can't tell where,—and he told me he had been to Hartford, and had procured the blanks, and that if I would come to his office he would deliver them to me." The other evidence in the case, including that of Mr. Dennis, the secretary of the company, leaves no doubt of the fact that Mr. Phillips informed him of the death of Edwards, and of all that was known about it at that time, though very little was known in Southbridge, as he died in Boston. Mr. Dennis gave Phillips the blanks for the regular proofs of death, which the company always required, which blanks contained instructions as to how these proofs should be made out, and what should be contained in the affidavits directed by the company to be made. Mr. Phillips delivered these papers to Bartholomew within a day or two after his visit to Hartford, and said to him: "When you get them completed I want you to return them to me." This Bartholomew swears to positively, and Phillips, while he does not recall the direction to return them to him, says that he is not willing to swear to the contrary. These affidavits were made out and delivered to Phillips on the third day of July. Through some neglect on his part, they remained in his office beyond the period of seven months which the policy fixed as the time within which they should have been delivered at the Hartford office. His attention having been brought to these papers in some manner,

not particularly described, he called upon Bartholomew with them, and stated that they were not sufficient in regard to the particulars of the death of Edwards. They were afterwards returned to Phillips, who forwarded them to the company about the seventh day of February, 1883, which the company now insists was too late.

The whole of the testimony upon this narrow issue turns upon the question whether the absence of a written notice of the death of the insured, when the company had full notice of it through Phillips, their agent, and whether the delivery of the proofs of death to the company after the expiration of the seven months, although they had been delivered to the agent Phillips within the time required, shall defeat a recovery.

The opinion of the judge who tried the case, on a motion for a new trial, states the facts as he understood them, and, as we think, with accuracy, together with his view of the law of the subject, so well that we transcribe it here: "The facts are as follows: The insured died June 19, 1882. A day or two afterwards E. M. Phillips, who is described in the receipt referred to as 'agent of this company at Southbridge, Mass.' met one of the family of the deceased on the street, informed him that he was going to Hartford, and would give the company the requisite notice, and would procure the necessary blanks for the proofs of death. He did go to Hartford on or about the twenty-first of June, saw the secretary of the company, gave him notice of the death, stating all the particulars which he then knew, and obtained the blank proofs. On his return he handed the blanks to one of the plaintiff's representatives, saying at the time, 'When you get them completed I want you to return them to me.' They were filled out and delivered to him July 3, 1882. He retained them for several months, and then returned them to a brother of the plaintiff, saying that they were incomplete, and demanded additional information. On the twenty-ninth of January, 1883, they were again delivered to Phillips, and by him sent to the company on or about the seventh of February. The company, in acknowledging their receipt, made no objection that they were received too late, and retained them in its possession. They were produced on the trial by the defendant's counsel. It must be held that, if the plaintiff has not followed the contract literally in these particulars, it was because she was misled by the course of the defendant, and that the defendant is not now in a position to take advantage of the plaintiff's omission, having waived a strict performance of the con-

tract." See *Edwards vs. Travelers' Ins. Co.*, 22 Blatchf., 225, 20 Fed. Rep., 661.

Without deciding whether this notice to Phillips of the death of Edwards would have been a sufficient compliance with the contract requiring a written notice of the death to be given to the company at Hartford, if it had been attempted to comply with the condition in that manner, and without deciding whether, if the proofs of death had been made out and delivered to Phillips, with no more in the case than that, it would have been a sufficient compliance with that provision, we are of opinion that the whole course of dealing by the company with Phillips, and with the plaintiff below, establish the proposition that the company recognized Phillips as its agent for these purposes, and so acted upon his information of the death of Edwards as to accept that as sufficient notice, and to constitute him their agent for the purpose of receiving the proofs of death. Phillips went to the office of the company in Hartford. He there gave the information of the death of Edwards to the company, with such particulars as were then known in regard to the incidents of his death. The acting officer of the company, the man who in his own testimony describes himself as having charge of claims for losses by death, then furnished him with the requisite blanks for the further proof required by formal affidavits of the parties. The officer knew that Phillips was treated by the insured as the agent of the company for giving this notice, he accepted that notice, he acted upon it, and he intrusted Phillips, who was an agent of the company, and had been so for ten years or more, with the forms of affidavits necessary to show what the company required to be proved in order to justify them in paying the money upon the policy. Phillips undertook this business, delivered these blank affidavits, and stated to the plaintiff's agent that they were to be returned to him when completed. They were so returned to him, but, without sending them to the company after keeping them a long time in his possession, he again gave them to the plaintiff's agent, with the declaration that they were imperfect, and suggested further proofs.

Soon after this they were returned to him, though it is not stated whether any further proofs were made out or not, and he then forwarded them to the company. He evidently considered himself as the agent of the company when he required additional proofs. As confirmatory of this, the evidence shows that the company received the proofs without objection and when, some time afterwards, a brother of the plaintiff made an inquiry of the company in regard to them,

they acknowledged that they had received them on the tenth day of February, but made no objection that it was too late. They also acknowledged the receipt of "papers in the case of Frank Edward" in the following letter, dated February 9, 1883 :—

E. M. Phillips, Esq., Ag't, Southbridge, Mass.—DEAR SIR: Your letter of the seventh inst., with papers in the case of Frank Edwards, at hand. We understand a chemical analysis of his stomach was made. We should like a full report of the analysis, certified to by the chemist who made it.

Yours truly,

RODNEY DENNIS, Sec'y.

In this there was no hint that the papers were received too late, or that no sufficient notice had been given, but simply the expression of a desire for further information with regard to the actual facts of the case, which would have been useless if the company intended to rely upon the failure to give this notice in time. Afterwards, on March 10, 1883, S. K. Edwards,—"for Katy L. Edwards," the plaintiff below, wrote to the company, asking for the date of proof of death of Mr. Frank Edwards, and when it was received at the office. To this the following reply was made :—

THE TRAVELERS INSURANCE CO., CLAIM DEPARTMENT,
HARTFORD, CT., March 13, 1883.

S. K. Edwards, Southbridge, Mass.—DEAR SIR: In reply to yours of tenth inst., would say that we received a letter from agent Phillips, dated February 7th, 1883, wherein he writes: "I found the inclosed upon my table on my return home, and forward the same." The inclosed were incomplete proof papers relating to the death of Mr. Frank Edwards, and we acknowledged the receipt of same February 9th, asking for a full report of the analysis of Edward's stomach, the report to be certified by the chemist who made the analysis. We have no further intelligence respecting the matter.

Yours truly,

RODNEY DENNIS, Sec'y.

On March 20th, S. K. Edwards, on behalf of his sister, again wrote to the company making inquiry if February 9th was the first time they had the proofs of the death of Frank Edwards, to which the following reply was made :—

MARCH 21, 1883.

S. K. Edwards, Esq., Southbridge, Mass.—DEAR SIR: Your letter of the twentieth inst. is at hand. We received the incomplete proofs of death, to which we alluded in our letter of thirteenth inst., on the tenth of February for the first and only time. We have only received them once.

Yours truly,

RODNEY DENNIS, Sec'y.

During all the correspondence which passed upon this subject Mr. Dennis, the officer of the company, nowhere intimates that these proofs came too late, or that they were rejected by the company, but the only complaint made was that he had not received the chemical

analysis of the contents of the stomach. Under all the circumstances of this case, we are of opinion that the company treated Phillips as their agent for the purpose of the early notice of the death of Edwards, and also of the receipt of the final proofs thereof, and that it is too late for them now to undertake to defeat this action upon the ground that he was not their agent for any of these purposes. We do not deem it necessary to go into a critical examination of the authorities upon the question so often raised of the powers of agents of this class. We simply hold that whether upon the face of the policy, and the receipt with its indorsements, taken alone, Phillips can be held to have been the agent of the company to whom the notices in question could be properly delivered or not, that the action of the company upon Phillip's communications to its secretary at Hartford of the information of the death of Edwards, and its delivery to him of the blank affidavits and forms which it required to be filled up, together with the subsequent correspondence, show conclusively that the company considered Phillips as its agent throughout the transaction with regard to these notices, and it is therefore bound by what he did. The judgment of the circuit court is affirmed.

SUPREME COURT OF TEXAS.

PRICE

vs.

SUPREME LODGE KNIGHTS OF HONOR ET AL.*

A member of a benevolent order assigned his certificate payable to his wife and children, with the consent of the society, to a cousin living with him and dependent on him for employment and support. The latter paid up dues in arrears and the subsequent dues according to the agreement on which the assignment was made. The laws of the society allowed a member to make any party a beneficiary.

Held, That the agreement for the assignment was a wagering contract and that the assignee had no insurable interest that would support it.

Held, That the certificate was payable to the original beneficiaries named therein.

T. J. GIBSON and BURROW & KINCAID, *for Appellant*.

COBB & FARRAR and HERRING & KELLEY, *for Appellees*.

WILLIE, C. J.

This suit was brought by H. K. Price to recover the amount alleged to be due him on a benefit-certificate issued by the supreme lodge of the Knights of Honor to Thomas C. Harper, who had died a member of the order. The other defendants were sued with the lodge because they were the beneficiaries named in the certificate, and set up a claim to the amount due upon it, in opposition to the plaintiff. The lodge made no defense to the action other than to ask the court to determine to whom the benefit money should be paid, and offering to pay it to the parties found by the court to be entitled to receive the money.

* Decision rendered, May 31, 1887.

The original petition alleged that the lodge was engaged in a mutual aid and life insurance business, and that Harper, by becoming a member, had his life insured to the amount of \$2,000, payable to the beneficiaries named by him. The beneficiaries named in the certificate were the defendants, who were the wife and children of Harper. The petition further alleged that it was necessary for Harper to pay certain dues to the lodge, from time to time, to entitle him to a good standing in the order, and his beneficiaries to the insurance money, in case of his death; that Harper paid these charges for a while, but afterwards became so far in arrears that his membership was subject to suspension, and was about to be suspended, and his benefit-certificate forfeited; that Harper applied to plaintiff, and offered that if the plaintiff would pay his arrearages, and continue to pay his lodge dues and assessments, he, Harper, would transfer to him his benefit-certificate. To this the plaintiff assented, and with the consent of the lodge, paid up all Harper's arrearages, and kept the certificate alive up to the date of Harper's death, by the payment of all dues and assessments for which he was liable as a member of the order. The appellant complied with his contract by making the payments as agreed, and kept the certificate alive down to the death of Harper. The latter was ready to make the transfer, and the lodge was ready to change the certificate, so as to make it inure to the benefit of the plaintiff; but the certificate could not be found, and was not found till after Harper's death. The dues were received by the lodge from Price, and he was recognized by it as the owner of the certificate. It was further alleged that the constitution and laws of the order allowed a member to make any person he might choose the beneficiary of his certificate, whether he held an insurable interest in the life of the member or not; and that it so contracted in the present instance. The plaintiff alleged that he held an insurable interest in the life of Harper as they were cousins, and plaintiff was a member of Harper's family, and in his employment, and dependent on him for employment and support.

General and special demurrers were filed to the plaintiff's pleading by the defendants other than the lodge, and these were sustained by the court below, and the plaintiff refused to amend. The cause was not dismissed; but, it having been agreed that the plaintiff had paid to the lodge \$17.75 in dues, arrearages, and mortuary assessments in behalf of Harper, judgment was rendered for the plaintiff for that amount, and for the defendants for the balance of the \$2,000, less the costs, etc. From that judgment this appeal is taken.

The judge below placed in writing his conclusions of law upon the demurrer, and these show that he held, among other things, that the agreement between Price and Harper was a wagering contract, and that it could not be enforced as against the lodge or the other defendants. In our view of this case, this ruling is all that need be considered in determining the appeal. It is too clear for argument that Price had no such interest in the life of Harper as entitled him to insure it for his own benefit. Indeed it is not claimed here that the fact that they were cousins, and Price an adult male member of Harper's family, and dependent on him for employment and support, gave him such interest as would support a life policy for his own benefit. But the appellant did not procure a policy on the life of Harper, but was the assignee of one which had been previously issued to Harper himself by the Knights of Honor. The consideration which he gave for the assignment was the payment of the money which was owing or might become due from Harper to the lodge in order to keep alive the certificate it had issued to him. The question, then, is, can a party, having no insurable interest in the life of another, receive an assignment of a policy of insurance issued upon the life of the latter, upon an agreement merely to pay the premiums or assessments necessary to keep the policy in force? This question has met with different answers from different courts of the United States. In our own State, no occasion for its determination has heretofore arisen.

It is almost universally conceded that policies procured by persons having no interest in the life of the insured are void at common law, as against public policy. The policy-holder has nothing to lose for which he can claim indemnity; on the contrary, his interest is in the early death of the insured. When that occurs he ceases to pay premiums, and receives the amount of the policy. This creates a temptation to destroy human life, and the common law forbids the contract. These are the grounds upon which such policies are held to be void. Are they applicable to a case where the policy is first taken out by the person whose life is insured, and then transferred by him to one who had no interest in his life? It is pretty generally held that if a person effects insurance upon his own life, and, in pursuance of a previous agreement, immediately, and without consideration, transfers the policy to one who has no interest in his life, but who agrees to pay the premiums upon the policy, it will be void: *Swick vs. Insurance Co.*, 2 Dill, 160; *Stevens vs. Warren*, 101 Mass., 564; *Mowry vs. Insurance Co.*, 9 R. L., 346; and it has been held by

the supreme court of the United States that a transfer would not be enforced, under such circumstances, though the insured were indebted to the assignee in a small sum disproportionate to the amount of insurance on his life; but the policy would be deemed security for the debt, and such advances as might afterwards be made on account of it: *Cammack vs. Lewis*, 15 Wall., 643.

Is there such difference between the principles upon which these decisions rest, and those applicable to the sale of a policy already procured to an assignee having no interest in the assured, as to make the latter lawful, while a policy procured without interest, and an assignment in pursuance of a previous agreement, are held invalid? The supreme court of the United States, in the case of *War-nock vs. Davis*, 104 U. S., 775, says that it cannot see any such difference; and, proceeding upon this view, many of the State courts have held such assignments void, or treated the assigned policies as mere securities for the moneys actually advanced by the assignee: *Insurance Co. vs. Hazzard*, 41 Ind., 116; *Insurance Co. vs. Sefton*, 53 Ind., 380; *Insurance Co. vs. Sturges*, 18 Kan., 93; *Gilbert vs. Moose*, 104 Pa. St., 74; *Baye vs. Adams*, 81 Ky., 368. This, too, is the conclusion to which many eminent text-writers have arrived. *May, Ins.*, § 398; *Greenh. Pub. Pol.*, 288.

On the contrary, the courts of several States have held such assignments valid, though the assignee could not have taken out for his own benefit an original policy upon the life of the assignor: *Clark vs. Allen*, 11 R. I., 439; *Marcus vs. Insurance Co.*, 68 N. Y., 625; *Clark vs. Durand*, 12 Wis., 223; *Insurance Co. vs. Allen*, 138 Mass., 24. We think those decisions which hold these assignments invalid are based upon the more satisfactory reasoning. When the policy is transferred it becomes the property of the assignee. He is subject to all the obligations imposed by it, and entitled to all its benefits. He becomes the holder of a policy upon the life of a person whose early death will bring him pecuniary advantage. The temptation to bring about this death presents itself as strongly to him as to a party who originally effects insurance for his own benefit upon the life of another. Public policy removes the temptation to take human life, and it cannot matter how that temptation is brought about. If, by reason of a contract between two persons, the one is tempted by pecuniary interest to destroy the other, the form of the contract is of no importance in testing its invalidity. The law looks to the substance of the matter,—the relation which the parties will bear to each other after the contract is executed; and, if its nat-

ural effect is to encourage crime, it will be avoided, no matter in what shape it may be presented. Those courts holding a contrary view say that a policy of insurance is a chose in action, and the owner may dispose of it as he pleases. But, when it is asserted that the owner of property may dispose of it at his pleasure, the assertion must be taken with the qualification that he does not thereby violate any provision of law, or contravene public policy.

It is further said that, because a contract is speculation, though human life be the subject of the speculation, it is not necessarily invalid; for instance, it is not unlawful to transfer an annuity, or an estate in remainder after a life-estate. If this reasoning be good, it would validate a policy taken by one having no interest in the life insured, as well as an assignment of a policy to such a person, for it is not unlawful to grant or create an annuity, or an estate in remainder after a life-estate, any more than it is to transfer one of these after it is created. Yet wager policies are almost universally held void, while annuities are sustained. Why this should be it is not necessary to discuss. It is sufficient that no analogy drawn from annuities or life-estates can be used to uphold policies procured in violation of public policy, and hence no such analogy of this kind can sustain an assignment of the same character. The case before us is, if possible, stronger than any to which we have referred. Here there was a bare verbal agreement between Harper and the appellant that the latter should pay the dues and assessments—in other words, the premiums—due and to fall due upon the former's life policy, in consideration of receiving at Harper's death the money due on the policy. It was but little better, if anything, than a parol gift of the certificate, by which the assignee was subrogated to all the rights of the assignor in the certificate. In fact, it was no more than an agreement to convey, which was never executed. While such an agreement might be enforced in a court of equity when made for a valuable consideration and a lawful purpose, it would have but little standing in such court if made for the purpose of giving the assignee an interest in the death of the assured. It is of no importance that the rules of the Knights of Honor permitted benefit-certificates to be transferred to persons having no insurable interest in the life of the member, and that it consented to the assignment made in this case. No action of the lodge could change public policy, or make a contract valid which the interests of society demanded should not be enforced. It certainly could make no agreement violative of law by which the rights of third parties could

be injuriously affected. This is not a question between the appellant and the lodge, but between him and parties who are entitled to the insurance money, if the assignment is void. The assignment did not vitiate the policy, but was itself of no effect, and left the insurance money payable to the parties originally designated in the certificate. From these views our conclusion is that the transfer having been made to one having no interest in the life of Thomas C. Harper, and upon no other consideration than the payment of premiums by the transferee, was void, as against public policy, and the insurance money was payable to the original beneficiaries of the certificate. The court did not err in sustaining the special demurrer which reached this point. There is no objection made here to the judgment so far as it is allowed the plaintiff below to recover the money advanced by him in the payment of premiums, and his right to this need not be considered.

There is no error in the judgment, and it is affirmed.

SUPREME COURT OF KANSAS.

KANSAS PROTECTIVE UNION

vs.

WHITT ET AL.*

After the death of a person holding a policy of insurance, and the insurance company is notified of his death by the beneficiary named in said policy, and the company refuses to pay upon the grounds that deceased was not a member of the company, and that the policy had been canceled for non-payment of a note given for membership-fee, *held*, that no formal proof was necessary, and that by denying all liability the company waived proof of death.

Where a policy contains no express stipulation that the failure to pay a note given for membership when due would render the policy void, and after a note so given becomes due the time of payment is extended by the company, and death occurs before this time of payment runs out, *held*, that no forfeiture of the certificate of membership can be declared for non-payment of the note when first due.

Where a policy contains an undertaking on the part of the insurance company to pay the beneficiary therein named \$2,000 upon the death of the insured, and not to exceed 75 per cent of the assessments collected, the beneficiary may recover on said policy without proving demand on the company to make assessments, or showing that assessments have been made, or, if made, the amount collected thereon.

FOSTER & HAYWARD, for Plaintiff in Error.

O. C. COWGILL and E. A. AUSTIN, for Defendants in Error.

CLOGSTON, C.

The policy, the foundation of this controversy, contains the following undertaking on the part of the company: "The said union does hereby promise and agree to pay * * * the sum of two thousand dollars to Ellen Whitt (wife), or her executors, administrators, or assigns, within sixty days from the close of the quarter

* Decision rendered, June 11, 1887.—Syllabus by Clogston, C.

in which satisfactory proofs of the death during the continuance of this certificate of the above-named member are received. It is provided, however, that the sum thus to be paid is conditioned upon assessments made therefor, and shall in no case exceed 75 per centum of the amount received thereon." The policy also contains some twelve conditions, but two of which are brought into question in this action, and are as follows: "That the annual dues and assessments, and any note given for any indebtedness to the union, shall be paid on or before the day on which they became due." "That if the certificate becomes a claim before the sum of ten dollars for each one thousand dollars of indemnity named shall have been received from payments made thereon for benefit of the reserve-fund of this union, the right is reserved by this union to deduct such deficiency from the amount due the beneficiary under this certificate."

The plaintiff in error contends that it is not liable on this policy—First, because no proof of death was furnished by the defendants, as required by the conditions of the policy; second, that the certificate of membership was canceled for non-payment of note given for membership-fee at its maturity; third, the court erred in refusing to allow the plaintiff to prove by their secretary that one Doyle was not their general agent; fourth, defendants in error failed to show that assessments had been made, and whether collected or paid in; fifth, the judgment was too large by \$20. These five assignments are all the errors claimed and discussed in the plaintiff's brief, and we will take them up in the order presented.

The evidence established the following facts: At the time Andrew Whitt became a member of the Kansas Protective Union the fee of membership was eight dollars; that in payment of that sum he gave his note, due August 30, 1884, and after the note became due he wrote to the company for an extension, which was granted, until November 1, 1884; that on October 26th he died, and October 30th his son, one of the defendants in error, wrote to the secretary, inclosing eight dollars, and signed his father's name to the letter; that immediately after the death of Andrew Whitt the beneficiary in the policy informed one Doyle, who was the general agent of the defendant, living in Sterling, Rice County, of such death, and requested him to inform his company, which he did by letter on November 4th, and in reply thereto he was informed by the company that Whitt was not a member of their company, his certificate of membership having been canceled for non-payment of note given in payment for membership-fee, and that they were not liable and

would pay nothing; that it was the rule and custom of the company, upon being notified of the death of one of its members, to at once forward the proper blanks on which to make proof of death, as required by their rules. No such blanks were furnished to the beneficiaries, and no proof of death was made.

Under this evidence we think no proof was required of the beneficiaries of the death of Whitt. The union had disclaimed their liability, and insisted that the certificate of membership had been canceled, and for that reason they sent no blanks for proof of death. Had they simply refused to pay because no proof of death had been made, then that objection would have been good; but, as the union disclaimed on other grounds, they must rely upon the objection then made.

The court instructed the jury that the denying of the liability on the part of the union to pay the loss was a waiver by the company of its right to demand the proper proof of death, and we think the authorities fully sustain this rule laid down in the charge upon this point: In *Norwich & N. Y. Transp. Co. vs. Western Mass. Ins. Co.* (34 Conn., 561) the court held that presentation of proof, under such circumstances, was of no importance to either party, as the law rarely, if ever, requires the observance of an idle formality, especially after the parties for whose benefit the original stipulation was made had rendered conformity thereto unnecessary and practically superfluous. See, also, *McBride vs. Republic Fire Ins. Co.*, 30 Wis., 562; *Insurance Co. vs. O'Connor*, 29 Mich., 241; *Aurora Fire & M. Ins. Co. vs. Kranich*, 36 Mich., 289; *Donahue vs. Insurance Co.*, 56 Vt., 382.

2. Was the policy forfeited by the non-payment of the note? We think not. In the first place, there is no clause in the certificate that by reason of non-payment the certificate shall become void. Of the twelve conditions thereto, two or more contain the provision providing for a forfeiture upon non-compliance, and rendering the certificate void. This certificate was prepared by the company, and its construction must be considered strictly against them. If they desired to render the policy void by reason of non-payment, they ought to have provided for that forfeiture. But outside of this, after the note became due, Whitt requested their agent Doyle to write to the company, and have the time of payment extended to November 1st, and in reply the company wrote 'that no suit would be brought upon the note until after November 1st. Now, the request must govern in this case, and it can make but little difference in what language the reply was couched. It was enough, whatever

was said, to say, in concluding their letter, "as requested." "As requested" meant that the time would be extended, and that no suit would be brought until after November 1st. This was practically extending the time of payment, and nothing was due on that note at Whitt's death. On October 30th young Whitt sent the money due on the note. This is not denied or disputed; but counsel for plaintiff in error insists that because young Whitt signed his dead father's name to the letter, that it was a payment after Whitt's death. What difference could it make to the union? The payment of the money was all they had a right to demand. It was paid before due. Can they complain because the boy thought he had to send the money in the name of his dead father? And if they did not consider this a payment, why retain the money? They cannot be heard to say, after receiving and keeping the money, that it was no payment on the note, because of Whitt's death.

3. The court committed no error in refusing to let the secretary testify as to whether Doyle was the general agent of the union. The plaintiff's petition alleged such agency, and the allegation was not denied under oath by the defendant's answer, and therefore admitted. Even the copy of the certificate attached to the petition, and made a part of it, bore the indorsement, "A. P. H. Doyle, General Agent;" and, if the evidence had been competent, the error in excluding it was immaterial, for what was done by Doyle would have been just as binding upon the union if performed by a stranger. What he did was done at the request of the Whitts, as their agent, and not as the agent of the union.

4. Plaintiff also insists that there was a failure of proof to show that the assessments had been made or collected, and the amount, if collected. There was no necessity, we think, for such proof. The undertaking on the part of the union was to pay the beneficiary of Whitt, after his death, \$2,000; but not to exceed 75 per cent of the amount of the assessments, if the amount exceeded \$2,000. The plaintiff in error had charge of these assessments, and they knew if such sum would be realized from the assessments. The burden of proof would be upon the company to show the amount realized or collected, and not upon the plaintiffs. They made no complaint to the beneficiary about the amount due. They were not going to pay anything; denied all liability, not because the assessments had not been made or paid, but because they claimed that Whitt's certificate had been canceled by non-payment. Fair dealing on the part of the company would require that it make a statement to the beneficiaries

of its reasons for non-payment. It had no right to pretend and give, as an excuse for non-payment, one reason before the suit, and now another.

5. And, lastly, the plaintiff in error insists that, if they are liable under this certificate, the judgment rendered was for \$20 too much; but it seems from the record that this objection was made for the first time in this court. The certificate itself shows that the company had a right to retain or deduct \$10 from each \$1,000, but it is nowhere shown that they made claim to this right. The union reserved the right to make this deduction, but, like any other right, they might waive it. Had they suggested this right, and made their claim to the court, that amount would have been deducted from the judgment; but they made no such request or claim, and they are estopped from claiming it here.

It is recommended that the judgment of the court below be affirmed.

By the Court. It is so ordered; all the justices concurring.

SUPREME COURT OF TEXAS.

SWENSON ET AL.

vs.

SUN FIRE OFFICE.*

A fire policy was assigned with consent of the company to B and subsequently without notice to B or the company the property was conveyed to C in violation of the policy.

Held, That the policy was void as to the assignee as well as the original insured and the case is not affected by an act permitting the assignee of a non-negotiable instrument to sue in his own name subject to every defense as if in the hands of the assignor.

SAYLES & SAYLES and G. A. KIRKLAND, *for Appellant*.
SHEPARD & MILLER, *for Appellee*.

WILLIE, C. J.

Joseph Strickland effected with the appellee an insurance upon his dwelling-house, and received a policy which, among other conditions, contained one to the effect that, if any change took place in the title to the property by sale, transfer, or conveyance, without the consent of the company indorsed upon the policy, the policy should become void. Subsequently, with the proper consent of the appellee, Strickland assigned and delivered the policy to the appellants as additional and collateral security for a debt due them from him, which was already secured by a deed of trust upon the house insured and the lots upon which it was situated. This deed of trust was in full force and effect when this suit was commenced. At a still later date, Strickland executed and delivered to Elizabeth Strickland a warranty-deed to the premises, and thereafter controlled and collected the

* Decision rendered, June 10, 1887.

rents upon the property as the agent of said Elizabeth. Neither the appellee nor the appellants had notice of the sale of the property until after the house was consumed by fire. This suit was brought by the mortgagees to recover the insurance money, and the defense was that the conditions of the policy were violated on the part of the mortgagor by his conveyance to Elizabeth Strickland without the consent of the company. The court below sustained the defense, and gave judgment for the company, and from this judgment the plaintiffs below prosecute this appeal.

It is not disputed by the appellants that the conveyance to Elizabeth Strickland was in violation of the terms of the policy, and would have avoided it had there been no assignment to the appellants; but it is contended that, after the assignment was made, no violation of its terms on the part of the assured would work a forfeiture as against the assignees. In support of this proposition the following part of a section found in *May on Insurance* is cited: "Though it be stipulated that the policy shall be void by alienation, this must be held to mean alienation by the party insured. If the original insured, by the consent of the insurers, assigns the policy, and the assignees agree with the insurers to pay all assessments which shall thereafter be made upon the policy, and that the property insured shall remain subject to the same lien as before, the legal effect of the transaction is to create a new, substantial, and distinct contract with the assignees. It is substantially the same as if the policy had been issued to them. An alienation, therefore, by a mortgagor of his equity of redemption, after an assignment of the policy, under the circumstances just stated, is not an alienation by the assured, but rather by a stranger, over whom the assignees have no control, and for whose acts they are not at all responsible, and does not avoid the policy." Section 276.

Admitting, for the purposes of the present appeal, that the above is an accurate statement of the law of insurance applicable to one holding a policy by transfer as collateral security for a debt due him by the insured, we cannot see that it is pertinent to the cause under decision. Some of the important facts upon which the right of an assignee to recover is thus made to depend are lacking in the present case. These are the agreement on his part to pay all assessments that shall thereafter be made upon the policy, and the further agreement that the property insured shall remain subject to the same lien as before. The authorities that sustain the above proposition treat these particular facts as changing the contract created by the

policy from one between the company and the original assured to one between the former and the assignee of the policy. Not only so, but they hold that they constitute a new consideration moving from the assignee to the company, and for this reason, the terms of the original contract are so far changed as to make the assignee the assured,—to substitute him in the place of the assignor as the party who is to perform all the conditions upon which the continued validity of the policy is to depend. The assignee is in fact treated as if he were the party to whom the policy was originally issued, entitled to all the rights, and subject to all the duties, pertaining to that position. The original policy forms the basis of the new contract, by which latter, for a new and independent consideration moving from the assignee, the company agrees to insure his interest, and these parties thereupon assume towards each other the position of insurer and insured: *Foster vs. Insurance Co.*, 2 Gray, 216. It may be that if the transfer to a mortgagee is made with the consent of the insurers, and the mortgagee assumes all the obligations of the mortgagor as to liens and payments which existed between the mortgagor and the company, a new contract is created with which the mortgagor has no concern and which no conduct of his can affect. That is not the question we are called upon to decide. Here there was no agreement on the part of the appellants to pay the premiums on the policy, or to perform any of the obligations originally assumed by Strickland. The mortgagees gave the company no consideration for its agreement to pay the insurance money to them in case it became due under the policy. The policy still continued as the contract between the original parties. The only effect of the assignment was to direct the insurers to pay the money in case of loss to the mortgagees, instead of the insured. The terms of the contract remained the same. The mortgagor was still the insured; and the policy became forfeited in case its conditions were violated by him. The company, neither expressly nor impliedly, waived any of these conditions, but merely consented that, in case they were all complied with, it would pay the money to the mortgagees. The liability of the company depended upon its contract with Strickland; and it cannot be claimed that, without consideration, it impliedly consented to any modification of that contract by merely agreeing to pay the insurance money to another person designated by Strickland to receive it. Insurance companies are held rigidly to a compliance with their contracts; but the law cannot make contracts for them different from those into which they have entered.

The decisions sustaining the rule as announced in the section quoted above were made in cases where mutual insurance companies were concerned. It would seem that these companies require members insuring their property to give notes for the premium due or to become due upon their policies, and that these notes are liens upon the property insured. These are the liens referred to in the authorities cited by the appellants. In the cases supporting the citations from *May on Insurance*, the assignees either assumed the payment of these notes or became liable therefor by adding their signatures to those of the assignors; and the lien upon the property, when one existed as security for the notes, was preserved in favor of the company. *Foster vs. Equitable Mut. Fire Ins. Co.*, 2 Gray, 216; *Bragg vs. New England Mut. Fire Ins. Co.*, 5 Fost., 289; *Boynton vs. Clinton & Essex Mut. Ins. Co.*, 16 Barb., 254; *Fogg vs. Middlesex Mut. Fire Ins. Co.*, 10 Cush., 337; *Francis vs. Butler Mut. Fire Ins. Co.*, 7 R. I., 159.

The leading decision is the one first cited from Massachusetts; and the citation from *May* is substantially in the language of this decision. But the supreme court of Massachusetts, in the subsequent case of *Hale vs. Insurance Co.* (6 Gray, 169), a case in which no new consideration was given by the assignee, held that the latter was affected by all subsequent breaches of the conditions of the policy on the part of the assignor. This last case is directly in point with the present; the others are not. Some of the earlier decisions in New York held a doctrine in accordance with that contended for by the appellants, and one or more other States followed these decisions; but the later decisions of New York have overruled the previous cases in that State, and the doctrine that an assignment with no new consideration given to the insured by the assignee operates as a new contract between these parties is now almost universally repudiated. The true doctrine, and that borne out by numerous decisions, is that announced by Mr. Wood in his work on *Insurance*, § 342, viz.: "By an assignment of the policy with the consent of the insurer, the company is not regarded as yielding any of its rights as to the performance by the assured of all the conditions of the policy; and any violation by the assured of any of the conditions of the policy is fatal to a recovery by the assignee." See authorities cited in notes 2 and 3, p. 579, and note 1, p. 580. The case is, of course, different when the premises are sold and the policy assigned. The above-recited doctrine is decisive of the present case.

Articles 266 and 267 of our Revised Statutes do not affect the question. This is not merely a question as to a defense arising after the transfer of the instrument. The policy was to become void if the property was conveyed without consent of the insurers. It was a condition, compliance with which was absolutely necessary to the right of recovery, that the title should remain in the assured unless it was conveyed with consent of the company. An assignment of a contract does not relieve either of the original parties from the performance of such conditions. If one gives his note to another, payable on condition that the former does certain work and labor for the maker, an assignment of the note, though with the knowledge of the maker could not make the latter liable for the money if the work was not performed. The statute protects against defenses arising between the assignor and the maker after notice of the transfer. If the rule contended for by the appellant be correct, any obligee of an executory contract could transfer it to a third party, and force the obligor to comply with his promises, though the obligee had utterly failed to perform his, by merely giving to the former notice of the assignment. This proposition needs no further refutation than its mere statement.

We think the judgment below was correct, and it is affirmed.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF MISSOURI, E. D.

FRY

vs.

CHARTER OAK LIFE INS. CO.*)

Laws Conn., 1875, pp. 12, 13, §§ 1, 2, provide, in the event that the capital of a life-insurance company becomes impaired, it shall become the duty of the insurance commissioner to proceed against the company to annul its charter, and to wind up its affairs. The scheme of liquidation provided contemplates the audit and allowance of all demands against the corporation, including therein the reserve due on all outstanding policies, and an equitable application of all the corporate assets to the payment of the demands so audited. The defendant, a mutual insurance company of Connecticut, having become insolvent, the insurance commissioner, on September 21, 1886, began proceedings in the Supreme Court of Errors of Connecticut to annul its charter, and wind up its affairs. On September 28th, policy-holders in Missouri commenced suits by attachment to recover the reserve value of their policies. *Held*, That all policy-holders of the company, whether residents of Connecticut or Missouri, were presumed to know the terms of its charter, and the laws regulating its existence, and were bound thereby, in the absence of special provisions for the benefit of its own citizens by the State of Missouri when the defendant was licensed to do business there; that, as the fund attached was not deposited for the benefit of resident policy-holders in Missouri, they can claim no lien thereon; and that the plaintiff must be remitted to his share in the equitable distribution under the proceeding previously commenced by the State of Connecticut, through its insurance commissioner, on behalf of all the policy-holders of the company.

GEO. D. REYNOLDS, *for Plaintiff*.J. S. FULLERTON, *for Defendant*.

THAYER, J.

This is one of several suits by attachment pending in this court, brought by the policy-holders of the Charter Oak Life Insurance

* Decision rendered, June 11, 1887.—From *Federal Reporter*.

Company against the company, to recover the reserve value of their respective policies. The company is a Connecticut corporation. It became insolvent on or prior to September 21, 1886, and on that day the insurance commissioner of the State of Connecticut began proceedings against it in the supreme court of errors of that State, to arrest the further transaction of business, annul its charter, and wind up its affairs. In that proceeding receivers of all the corporate assets were appointed on September 22, 1886. On September, 28, 1886, this suit was begun, and an attachment was levied on certain property of the corporation situated in Missouri. The suit is in the form of a suit at law, and is brought upon the theory that, when a life insurance company becomes insolvent, each of its policy-holders may sue upon their policies as for a breach of the contract of insurance, whether it be a stock or a mutual company. The general question to be determined is whether the plaintiff can maintain the action, and obtain a preference over other policy-holders, or whether he should be remitted to the proceeding which has already been inaugurated by the State of Connecticut through its insurance commissioner, in behalf of all the policy-holders, to liquidate the affairs of the corporation.

It may be premised that the company, since its charter was amended, in 1878, has been a mutual company, and has conducted all of its business on that plan through a board of directors elected by persons whose lives are insured. In the State of Connecticut laws have been enacted such as now prevail in very many States, whereby the commonwealth undertakes, through an officer known as the insurance commissioner, to exercise rigid supervision over the affairs of life insurance companies. All life companies are required to make annual reports of their condition to that officer, and to undergo periodical examinations as to their solvency. And, in the event that the capital of a life company become impaired at any time, it is made the duty of the insurance commissioner to take proceedings against it, with a view of annulling its charter and winding up its affairs. The scheme of liquidation provided by the Connecticut statute contemplates the audit and allowance, under the supervision of a court of general jurisdiction, of all demands against the corporation, including therein the reserve due on all outstanding policies, and equitable application of all the corporate assets to the payment of the demands so audited: *Vide* Laws Conn., 1875, pp. 12, 13, §§ 1, 2. Such is a general outline of the scheme, which does not differ essentially from the Missouri statute on the same

subject. With respect to the Charter Oak Life Insurance Company, it is no doubt true that the act in question forms a part of its charter to the same extent as if it was expressly incorporated therein. It is a general law of the State from which the defendant derives its existence, and is in terms made applicable to every life insurance company chartered by the State of Connecticut. Now, although the defendant is a foreign insurance company, its Missouri policy-holders are conclusively presumed to be acquainted with its charter, and the laws of the State of Connecticut which determine and regulate its existence, whether as a "going concern," or as an insolvent company, and to have assented thereto when they became members of the company. They are accordingly bound by the terms of its charter, and the laws regulating its existence, to the same intent as policy-holders residing in the home State, unless some special conditions were imposed by the State of Missouri for the benefit of its own citizens when the defendant was licensed to do business in this State: *Relfe vs. Rundle*, 103 U. S., 222.

It will suffice to say that no conditions were imposed by the State of Missouri which in any sense modify the relation of Missouri policy-holders to the defendant company. The defendant was not required to make any deposit in this State for the exclusive benefit of resident policy-holders. The property which has been attached in this State was not deposited with any State officer, or with any trustee for the benefit of resident policy-holders. It is property which the corporation has acquired in the State of Missouri in the ordinary transaction of its business, and no policy-holder can claim any lien thereon, or peculiar interest therein, because of his residence in this jurisdiction.

Upon the case stated the question arises whether policy-holders may seize the property of the company when it becomes insolvent, wherever found, notwithstanding the fact that the State of Connecticut has begun proceedings to wind up its affairs, and without reference to the rights of other policy-holders, and the provisions of the company's charter which, in the event of insolvency, contemplates a valuation of all outstanding policies according to the Connecticut table of mortality, and an equitable distribution of the corporate assets among all creditors and policy-holders. In my judgment this question must be answered in the negative. The charter of the company, and the "winding-up act" of the State of Connecticut, which must determine the rights of policy-holders as between themselves, and as between themselves and the company, did not con-

template that there should be a mere "race of diligence," as between policy-holders, in the event of insolvency. When plaintiff became a member of the company he assented to that form of supervision which the State of Connecticut undertook to exercise for the benefit of policy-holders over the affairs of the company while it was a going concern, and impliedly agreed that there should be a valuation of all policy-obligations according to a certain standard, and an equitable distribution of the company's assets in the event of insolvency: *Relfe vs. Rundle*, supra; *Rundle vs. Life Ass'n of America*, 10 Fed. Rep., 720; *Davis vs. Life Ass'n*, 11 Fed. Rep., 784; *Taylor vs. Life Ass'n*, 13 Fed. Rep., 493.

Every member of the defendant company has the right to insist upon that agreement, as against another member who is seeking an inequitable preference; and the company itself, so long as the proceeding on the part of the State of Connecticut is pending against it, has a right to invoke the agreement as against a suit of this nature.

There is another view of the case which, in my opinion, should preclude suits of this character, at least during the pendency of the proceeding in the home State. The proceeding now pending in the State of Connecticut, as before explained, is essentially a suit by the State to annul the defendant's franchise, and liquidate its affairs. It is a special statutory proceeding, applicable to insurance companies whose capital has become impaired. In that class of cases it is the rule that the filing of the complaint by the State operates as a sequestration of the corporate property, for the purposes contemplated by the statute under which the proceeding is brought, from the filing of the complaint, and not merely from the entry of a final decree: *Atlas Bank vs. Nahant Bank*, 23 Pick., 480; *Colt vs. Brown*, 12 Gray, 233.

If the present attachment had been sued out and levied in the State of Connecticut after the commencement of the proceeding to wind up the company, and prior to the appointment of any receiver, the right acquired by the State as against corporate property, by filing his bill, would have prevailed over that of the attaching creditor. Such would clearly be the case with respect to property situated in the State of Connecticut; and, in my opinion, the commencement of the proceeding in the home State should have the same effect with respect to property located in the State of Missouri, as against this plaintiff, who is himself a member of the company, and, under the terms of its character, is only entitled to an equitable proportion of its assets in the event of insolvency. If he was a gen-

eral creditor, and not a member of the corporation, the rule might be different.

Upon the whole case my conclusion is that the present suit cannot be maintained. Plaintiff is a member of the defendant company, and as such is entitled to participate with other policy-holders in a pro-rata distribution of its assets. A suit was pending in the home State to accomplish that result when this action was filed. The plaintiff in that case represents all the policy-holders, as well as other creditors of the company; the proceeding is for their benefit; and it is only by means of a suit of that character that the rights of all the policy-holders of the company can be secured. Nothing but confusion and inequality can result from entertaining a suit of this nature in this jurisdiction. It will accordingly be dismissed, without prejudice to plaintiff's right to intervene in the proceeding pending in the home forum.

SUPREME COURT OF CALIFORNIA.

HEGARD

vs.

CALIFORNIA INS. CO.*)

The policy provided that in case of depreciation of the property a suitable deduction from the cash cost of replacement should be made to ascertain the cash value.

Held, That the age of a building was not an essential element in judging of depreciation, the ultimate question was, its condition just before the fire as compared with a new building.

Held, That in the absence of evidence as to such depreciation on the part of the company, testimony as to probable depreciation before the issue of the policy was harmless error.

E. W. McGRAW, *for Appellant*.

W. W. KELLOGG and R. H. F. VARIEL, *for Respondent*.

PATERSON, J.

It is urged by respondent that the proceedings in the court below for a new trial were not within the time allowed by law therefor, and that in consequence thereof we should consider only the judgment-roll on this appeal. It is sufficient to say, in answer to this proposition, that no objection was made in the court below to the proposed bill of exceptions, or to the hearing of the motion for a new trial. The appellant prepared and served its proposed bill of exceptions. The respondent, without objection, proposed amendments thereto. The court, without objection, settled the bill, fixed a time for argument, heard and decided the motion for a new trial, without any suggestion from respondent that the proceedings had not been commenced in time or prosecuted with diligence. Under these circum-

* Decision rendered, June 14, 1887.

stances, we think that the respondent's objections ought not to be heard in this court. The record is silent upon the question whether any extension of time was given by order or stipulation: *Gray vs. Nunan*, 63 Cal., 220. The plaintiff recovered a judgment of \$1,950, and from that judgment, and an order denying a motion for a new trial, the defendant appealed.

It is contended by appellant that the plaintiff ought not to recover because he overvalued the property, and because he falsely represented that he was the sole owner of the property insured. The policy contained stipulations that, in the event of false representations in regard to any of these matters, the policy should be void. Upon these issues the court found in favor of the plaintiff, and the findings are supported by the evidence.

In the policy upon which the plaintiff founded his right to recover, there is this provision as to the measure and mode of computing the damages: "In no case shall the claim be for a greater sum than the actual damage to or cash value of the property at the time of the fire. * * * The cash value of property destroyed or damaged by fire, shall in no case exceed what would be the cost to the assured at the time of the fire of replacing the same; and, in case of the depreciation of such property from use or otherwise, a suitable deduction from the cash cost of replacing the same shall be made to ascertain the actual cash value." Upon these provisions in the policy, and the rulings of the court on the evidence offered on this topic, the appellant places its chief reliance for a reversal of the judgment. The record is as follows:—

William Kinzie, witness for plaintiff, testified: "Am a carpenter and mechanic. Know the cost of building in Quincy for many years past. Was well acquainted with Hegard's saloon that was burned. At the time of the fire it would have cost \$1,264 to replace that building. In October, 1883, materials were a little higher than at the time of the fire, and then it would have cost \$1,334. Cross-examination. What is a reasonable deduction from your cost of replacing the building for depreciation in the value of the original building, which was built in 1856 or 1857? [Objected to as not cross-examination; that the question was irrelevant and immaterial. Objection sustained, and defendant excepted.]"

G. B. Somner, called for plaintiff, testified same as witness Kinzie.

DEFENDANT'S TESTIMONY.

G. B. Somner, recalled for defendant, testified: "Of the \$1,264, cost of replacing that building, \$809 would be for the original building, and the rest for the additions. Question. What would be a reasonable deduction, from your estimate of the cost of replacing the building, for depreciations in the value of the original building, which was built in 1856 or 1857? [Objected to

by plaintiff as immaterial, irrelevant, and incompetent.] The court to counsel for defendant. Depreciation from what time? Mr. McGraw. From the time the building was built. The court. That is not proper. I will allow you to prove depreciation since the policy was issued, but not before. [Objection sustained. Defendant excepted to the ruling.]”

This point of contention raised between counsel and the court as to the period of depreciation, it seems to us, is one of form and theory, and without merit or application. The age of the building is not an essential element of the criterion for damages which is prescribed by the contract. The material questions—the ultimate facts to be determined—are, what was the actual condition of the building immediately before the fire? To what extent was it worn or dilapidated by use or by the elements? How much worse was its condition than a new building of the same plan, form, and execution, and what is a reasonable deduction for the depreciation? The time when the building was erected is immaterial. The house may have been built at one time, painted at another, decorated still later, improved at intervals, and the exact time when it reached its best finish be forgotten. How, then, shall we apply the rule contended for by defendant? The facts in this case illustrate its inapplicability. Many and great changes had been wrought in the form and substance of the building. After a quarter of a century the original building was transferred to another lot. A part of the sills had been removed, and new ones put in their places, portions of the floor were treated in like manner, new lathing was substituted, the ceiling was plastered, the walls were “patched,” and papered, the wainscoting repaired, and a brick chimney added. In January, 1882, a new wing was attached, and in August, 1883, an addition was erected, which appears to have been fully half as large as the original building. To enable a witness to apply intelligently the rule contended for in this case he must have watched for nearly thirty years the changes which had occurred in the building by use thereof, and by action of the elements. But, as stated before, the period of time through which the building had passed is immaterial; the material question being what was its actual condition and value at the time of the fire? The word “depreciation” seems to have been used by the parties to the contract rather in the sense of deterioration than in its strict signification.

No other effort was made by defendant to show the condition or value of the building than as shown in the above copy of the record. We think, therefore, that the failure of the defendant to show

the actual detriment, if any, for which a deduction should be allowed, was due to its adherence to an immaterial matter. The fact that the court erroneously proposed another and more limited period of "depreciation" was not, under the circumstances, such an error as could have operated to the prejudice of the defendant.

The witnesses Kinzie and Somner were experts, knew the building and could have stated, no doubt, how much less the old building was worth than the new one, the value of which they had fixed in the sum of \$1,264. The evidence is sufficient to justify the findings of the court as to the value of the building. Mr. Dorsch, agent for defendant, testified that he examined the whole property insured, including the building, and thought the values were fair. It is conceded by respondent that the judgment is excessive to the amount of \$185, the value of certain articles which the court below considered under the description of "bar-room fixtures."

The cause is remanded, with directions to the superior court to modify the judgment by substituting the figures "\$1,765," for the figures "\$1,950." In all other respects the judgment and order are affirmed. We concur: Searls, C. J.; Thornton, J., McFarland, J.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SAUNDERS

vs.

ROBINSON.*

A member of a subordinate council entitled to a voice in its representation in the supreme council of a benevolent order is a member of that order, and a benefit payable to the widow of such member cannot be attached by a creditor of the widow as in ordinary life insurance, while in the hands of the association.

W. F. SLOCUM, *for Plaintiffs.*

W. S. STEARNS and J. H. BUTLER, *for Trustees.*

DEVENS, J.

It is the contention of the plaintiff that Carlton W. Robinson was not a member of the association known as the Supreme Council of the Royal Arcanum; that there were two distinct bodies, and that there is a distinction between such membership and that of the Royal Arcanum of which he was a member. He, therefore, urges that while a benefit-certificate was issued to Robinson as a member, it is to be treated as an ordinary insurance on his life, and that as he cannot be regarded as a member of the corporation that issued it, the rules which apply to policies of insurance on lives govern it and not those which apply to certificates issued under the provisions of chapter 115, section 8, Public Statutes. The articles of association and also the certificate of incorporation being silent as to who shall be treated as members of the corporation, the plaintiff contends that its constitution—art. 4, § 1—which provides that this “supreme council shall be composed of its officers, the representatives from

* Decision rendered, March 28, 1887.

grand councils, and all past supreme regents," and that "no other member of this order shall be admitted under any circumstances" except that original incorporators, if in good standing in their subordinate councils, shall be life-members, prescribes the only rule for membership, and therefore, that Robinson cannot be regarded as a member. There is, it must be admitted, a certain confusion resulting from the fact that the supreme council is sometimes treated in the certificate of incorporation, constitution and by-laws as the corporation, and sometimes as only its governing body who directs its operations. It is to the body acting in the latter capacity that the article in question refers. The section quoted contemplates distinctly, by the use of terms referring to them, that there are other members of the order. An examination of the whole system will show that the association was established among other things for the purpose of affording mutual aid to its members and also for the purpose of establishing what was termed a widows and orphans' benefit-fund for the payment of specific sums to the widows, orphans, and other dependents of deceased members. It transacted its business mainly through the agency of grand councils composed from the subordinate councils in each State, and through the agency of their subordinate councils, both of which councils operated under charters granted by the supreme council and in accordance with the rules prescribed in such charters. As Robinson became a member of a subordinate council he was entitled to a voice in its representation in the supreme council as the governing body. When in the certificate of incorporation members of the supreme council of the Royal Arcanum are referred to as those for whose benefit the association is intended, those who constitute the body who administer its affairs are not alone included, but all who, through the subordinate councils, become members of the organization or order as it is termed.

The defendant further contends that the sum paid in by the beneficiary is not a fixed sum to be held by the association, but as, with the exception of a small sum paid upon his admission into the order, he is to pay fixed assessments from time to time as they may be deemed necessary, and as they shall be ordered by the supreme council for the payment of what are termed death-benefits, the fund is not raised in the manner contemplated by Public Statutes, chapter 115, section 8. But the scheme is one of co-operative insurance, and there is no more objection to this mode of providing the fund than to an assessment insurance on lives, when effected by a stock com-

pany incorporated for such insurance : *Commonwealth vs. Wetherbee*, 105 Mass., 160.

It enables a party to lay aside portions of his income in the nature of an insurance upon his life to be applied at his death to the use of his widow, orphans, or other dependents, although the method in which he lays it aside is by providing them with a right to its payment from the accumulated funds of the corporation or from an assessment on others to be laid by it : *Elsy vs. Odd Fellows' Mutual Relief Association*, 142 Mass., 225; 6 East. Rep'r, 127; *Crossman vs. Massachusetts Benefit Association*, 143 Mass., 435; 9 East. Rep'r, 570; Stat. 1880, chap. 196.

If we were able to hold that the benefit-certificate was like an ordinary policy of insurance, that Robinson was not a member of the corporation, or that its funds were not obtained in compliance with the laws regulating associations of this class, we cannot perceive that it would be for the advantage of the plaintiff. If Robinson was not a member, or if funds can only be obtained to pay his benefit-certificate by methods not permitted by law to this corporation, the act of the association in issuing the policy was *ultra vires* and cannot be enforced by us.

Whatever the remedy, if any, Robinson's administrator might have to recover back what he had paid, his beneficiary, of whom it is alleged the corporation is trustee, could not enforce such a contract. It is only upon the theory that she can, that the plaintiff can charge the association as her trustee. That the association had made a contract such as it might lawfully make with Robinson, as its beneficial member, is, therefore, the point of view apparently most favorable to the plaintiff's contention.

Without considering whether there had been a change in the beneficiary fully completed at the time the process was served, and, assuming there had not, the question is presented whether the fund, which became payable to the wife upon the death of her husband, would after such death be attachable by the trustee process. That if the benefit-certificate is to be treated as an ordinary life insurance policy, the amount due would become liable for her debts on the decease of her husband may be conceded: *Norris vs. Mass. Life Ins. Co.*, 131 Mass., 294; *Troy vs. Sargent*, 132 id., 408, 409.

The chapter 115, section 8, enacts that a corporation organized under that chapter may "provide in its by-laws for the payment by each member of a fixed sum to be held by such association until the death of a member occurs, and then to be forthwith paid to the

person or persons entitled thereto, and such fund so held shall not be liable to attachment by trustee or other process." In viewing the object of these beneficiary corporations, of the limited number of persons for whose benefit they are intended, of the fact that the member of the corporation could not provide for his creditors by a benefit-certificate, or dispose of the fund by testamentary bequest, we cannot doubt that the fund due on the certificate is not subject to attachment while it remains in the hands of the corporation. If it were, it would be impossible for the member in many instances to provide for those for whom it was contemplated that he should by this method be able to make provision. It is unnecessary, therefore, to consider whether there had been a completed change in the beneficiary made by the member at the time of his decease.

Judgment affirmed.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF TENNESSEE.

YONGE

vs.

EQUITABLE LIFE ASSUR. SOC. ET AL*.

The local agent agreed with the insured that he would take the latter's note and advance the first premium. After the policy was mailed for the delivery to the agent the insured was taken sick and subsequently died, and the policy was never declined.

Held, That the contract became binding when mailed, or at any rate upon reaching the agent, and the company was liable.

CREED F. BATES and RICHMOND & CLARK, *for Complainant*.

DE WITT & THOMAS, *for Respondents*.

Key, J.

On the fourteenth July, 1885, W. W. Yonge made application for insurance upon his life for the benefit of his wife, the complainant, to the defendant company. An examination of that date, by a medical examiner of the company, was made, and the risk was reported as a good one. The papers were forwarded from Chattanooga to Louisville, Kentucky, to general agents of the company. These agents discovered an error or omission in the report of the medical examiner, and sent that paper back for correction. This delayed matters for about a week, at the end of which time the papers were forwarded to the home office in New York. The action of the home office was favorable, and a policy was duly executed and mailed to the general agents at Louisville, on the twenty-eighth day of July.

* Decision rendered, May 12, 1887.

1885, and by them was mailed to the agent here, whom it reached upon the forenoon of the fifth of August, 1885. He called at the office of Yonge in the afternoon to deliver the policy, but did not find him. Next day (6th) the agent learned that Yonge was not well. The day following (7th) the agent called at Yonge's office, and learned that he was at home sick; not seriously, as was supposed. On learning the agent's business, a friend of Yonge's, and his associate in business, tendered the premium, and requested that the policy be delivered to him. The agent declined to accept the premium or surrender the policy, upon the ground that the policy did not go into effect until the first premium was paid in the lifetime and good health of the applicant. Yonge's illness grew more serious, and he died upon the ninth of September, 1885. This bill was filed to enforce a surrender of the policy, and to have it paid.

In addition to the facts already stated, the proof establishes the following: The agent of the company persistently urged Yonge to make this application, when Yonge gave as a reason for not doing so that he was afraid he would not have the money to pay the first premium; or, to put the matter in the agent's language:—

Yonge hesitated to take a policy, because he said he could not meet the first premium. I then proposed to give him sixty days in which to meet his first quarter's premium, he to give me his note. He consented to this arrangement, and I made out his application, and he was immediately examined by the society's medical examiner.

According to the view I take of this case, it is not necessary to determine what effect the delays of the officers of the company have upon the rights of the parties. The proof shows that the policy arrived in the morning, and Yonge was taken sick in the afternoon of the same day. If it had not been for the week's delay caused by the mistake or omission of the company's medical examiner, the policy would have reached the hands of the applicant, no doubt, some days before his attack of sickness. Again, it is shown that the policy was mailed in New York eight days before it reached its destination. There is nothing in the proof which accounts for this delay. But the case is decided upon other grounds.

The agent who took the application states:—

When I take an application, and send it to the society, if the application is accepted, the policy is sent to me, and I must send either the money due as the premium, or return the policy; and if I take a note it is a personal matter, and the note belongs to me. The society does no credit business, and looks to me for the premium.

As between the applicant and the company, this contract was complete. There was left no act for the applicant to perform, so far as the company was concerned. The agent was to pay or account for the premium to his principal. It was as if Yonge had paid the money into the agent's hands. The consideration had moved from Yonge to the company, and no act remained but the right of the home office to reject or accept the risk. The execution of the note was a personal matter between the agent and the applicant, but not as agent. He, as agent, could not credit, so he states. The note was to be to him and for him. The company has no right to or interest in it.

May on Insurance, 64, says:—

A policy purporting to be signed, sealed, and delivered, as required by the charter, is complete and binding against the party executing it, though in fact it remain in his possession, unless some further particular act be required to be done by the other party to declare his adoption of it.

Again, the same author says (page 71):—

It follows from the rule that the contract is completed when the proposals of the one party have been accepted by the other, by some appropriate act signifying the acceptance; that the place of the contract is the place of the acceptance; and if an agent resident in one State, of an insurance company resident in another, forwards the requisite papers to the home office, and a policy is thereupon issued and mailed directly to the applicant, the contract is a contract made in the State where the home office is situated; and since the acceptance is the test of completion, it would seem that a transmission by mail to the agent, to be delivered by him to the applicant, would have the like effect.

The same writer says (page 526):—

And, if the agent be authorized to receive the premium, an agreement between the applicant and the agent that the latter will be responsible to the company for the amount, and hold the applicant as his personal debtor therefor, is a waiver of the stipulation in the policy that it shall not be binding till the premium is received by the company or its accredited agent. The same is true if the language of the policy is that the premium shall be paid before the policy shall become valid.

I conclude that the policy in this case became effective and binding upon the company when it was placed in the mail in New York, July 28, 1885. If not then, certainly on the morning of August 5, 1885, when it reached the hands of the agent here.

There will be a decree, therefore, in favor of the complainant.

SUPREME COURT OF MINNESOTA.

WALES

vs.

NEW YORK BOWERY FIRE INS. CO.* }

Where the property has been destroyed by fire before the application for insurance was made, and the terms of the contract agreed on, and the insured knew the fact, but did not communicate it to the insurer, who accepted the risk and issued the policy in ignorance of it, the policy is void, and will not cover the loss, although antedated as of a date prior to the destruction of the property.

Held, under the facts of this case, that May 18th, three days after the loss occurred, must be deemed the date when the application was made, and the terms of the policy agreed on.

Lusk & Bunn, for Wales, *Respondent*.

TORRANCE & FLETCHER, for New York Bowery Fire Ins. Co.,
Appellant.

MITCHELL, J.

This action was brought upon a policy of insurance to recover the value of wood destroyed by fire between the hours of 10 A. M. and 1 P. M. of May 15, 1885. The policy bore date May 13, 1885, and purported to insure plaintiff's wood on the north side of the Manitoba Railway, at Armstrong's Station, for one year from noon of that date. The defense was that the agreement to insure was not entered into until May 18th, three days after the property was destroyed, of which fact plaintiff had knowledge at the time, but withheld the information from the defendant, who made the contract and executed the policy in ignorance of the loss of the property. It appears from the evidence that an application for insurance was made by plaintiff, on either the fourteenth or fifteenth

* Decision rendered, June 14, 1887.

of May, to Milligan & Ermentraut, insurance agents in Minneapolis, in the form of a written memorandum left at their office with their clerk, calling for \$1,000 insurance on wood, "on north and south sides" of the Manitoba Railway at Armstrong's Station. It is customary for insurance agents, when they have no company in which to carry a risk, to place it with some other agency, in which case the agency which takes the risk, after writing up the policy, intrusts it to the other agency to deliver, and to collect the premium, and then the two divide the commissions between them.

In the present instance, Milligan & Ermentraut, having no company in which they could carry the risk, on May 15th, took plaintiff's memorandum to the office of Cheeney, the agent of defendant, and not finding him at home, left it with his clerk, with the request to have it written up. The clerk promised that the matter would be attended to, but in fact she had no authority to accept applications, or bind the defendant company. The application was called to Cheeney's attention about 4 o'clock in the afternoon of the same day, but, it being in the "blanket" form, he could not accept the risk, and took no action in the matter. He supposed that Milligan & Ermentraut would call to see about it, but, not having done so, Cheeney went to plaintiff's office on May 18th, and "got authority" from him to write up two policies for \$1,000 each, one on wood on the north side, and the other on wood on the south side, of the railway track. It was not until this date that Cheeney assumed the risk for the defendant, or entered it in his register. The policies were dated back to May 13th, the date of the expiration of a policy in a Cleveland company which plaintiff had the year before obtained through Milligan & Ermentraut, who had, however, placed the risk with Cheeney, who was at the time agent of that company. The object of this was "to make the insurance continuous." After they were written up, the policies were delivered to Milligan & Ermentraut, who delivered them to plaintiff. Plaintiff learned of the loss of the wood on the afternoon of May 15th, but not until after his application had been left at the office of Milligan & Ermentraut. Neither Cheeney nor Milligan & Ermentraut had any knowledge of the loss until after the policies had been executed and delivered to plaintiff. Upon learning the facts as to the loss, defendant canceled the policies, May 30th. The premium was paid by plaintiff to Milligan & Ermentraut June 9th. They say they tendered it to Cheeney, but that he refused to accept it, and they, on

ascertaining that the policies had been canceled, tendered it back to plaintiff, but he refused to receive it.

Upon this state of facts we do not see how plaintiff can recover. As, in the case of any other contract, to constitute a contract of insurance, the minds of the parties must meet and concur as to terms. Now, prior to May 18th, Cheeney had never had any communication with any one regarding this insurance. He was ignorant even of what had passed between plaintiff and Milligan & Ermentraut. He knew nothing about the matter except what was disclosed by the memorandum of application left at his office May 15th. Had he accepted the risk on the terms of this application, and written up the policy accordingly, a different question would have been presented. But this he declined to do, because the risk in the form stated in the application was not one which he could take. The terms of the contract were never agreed on until Cheeney went to plaintiff's office on the 18th, and these terms were entirely different, both as to the amount and nature of the risk assumed, from those contained in plaintiff's original memorandum. Hence, even under the rule invoked by plaintiff, that, when an application for insurance is accepted, the risk attaches at the date of the application, the risk could not in this case attach, by relation, before the 18th; for that was the time when the terms were agreed on, and must therefore be taken as the date when the application was made, and the contract entered into.

If at that time both parties had been ignorant of the loss, it would have been competent for them, by antedating the policy, to have made it retroactive. But in fact the plaintiff then knew that the property had been destroyed, but did not communicate the fact to defendant's agent, who, in ignorance of the loss, accepted the risk, and issued the policy. Under these circumstances, the policy is void, and does not cover the loss. Order reversed.

SUPREME COURT OF PENNSYLVANIA.

LEBANON MUT. INS. CO.)

vs.)

HUMES.*)

The company was accustomed to give credit to its agent in the collection of premiums on policies issued through him and the agent in turn was accustomed to credit the policy-holders. A policy was renewed, but the renewed premium was not paid to the agent until a few days later and after a fire. The premium was forwarded to the company by the agent but refused, the company setting up a policy-provision that it should be void in case the premium was unpaid.

Held, That the provision was waived by a mutual understanding between the parties regarding credit.

STERRETT, J.

One of the conditions of the policy in suit is, if the assured "shall have neglected to pay the premium . . . then and in every such case the policy shall be null and void."

The alleged breach of this condition is the only defense interposed by the insurance company.

The policy, issued April 24, 1882, for one year from that date, was twice renewed. The first renewal certificate is dated April 4, 1883, to take effect at expiration of original risk, and the second, April 1, 1884, to take effect on the twenty-fourth of that month. In both of these certificates issued by the secretary under seal of the corporation, the payment of \$30, renewal premium, by the insured is acknowledged; but in point of fact the first was paid to the company on June 4, 1883, and the second was remitted to Mr. Tredick, agent of the company, on May 3, 1884, next day after the fire, and was by

* Decision rendered, October 4, 1886.

him immediately forwarded to plaintiff in error, who refused to receive or recognize it as a payment, for the reason that the property covered by the policy was destroyed before the renewal premium was paid or tendered.

On the trial evidence was received tending to show that Tredick, through whom the insurance was placed, was the recognized agent of the company for the purpose of securing risks, receiving and remitting premiums, etc.; that in his dealings with the company he was made its personal debtor for premiums on all policies issued through him, and that he periodically accounted to it therefor, whether the money was received by him for the persons to whom the policies were issued or not; that he made the persons or firms, to whom he delivered policies, his personal debtors, and dealt with them in that relation, charging them with the premiums on his books, sending them bills in his own name, and making himself responsible to the company for the same, and that the bills for premiums were generally rendered some time during the month after the insurance was effected.

The admission of this evidence was excepted to and is the subject of complaint in the first three specifications of error. In submitting the case to the jury, on the evidence above mentioned, the learned judge instructed them in substance to find for the plaintiffs if they were satisfied as to the truth of the facts alleged by them. These instructions are also assigned for error in the fourth to seventh specifications inclusive.

In view of the testimony, the instructions under which it was submitted, and the verdict in favor of plaintiffs for the full amount claimed by them, the jury must have found all the controlling facts in their favor. They must have found, among other things, that the relations existing between the company, Tredick, its agent, and the assured were of such a character that it could not be truthfully said the latter neglected to pay the last renewal premium. To visit upon them the consequences of neglect to pay the premium it should appear they were in default, that the premium was payable on delivery of the renewal certificate or within a specified time thereafter, and that they had neglected to pay it accordingly. The finding of the jury, however, negatives any such conclusion. They found the established course of dealing between the three parties concerned was, that Tredick, the agent, was treated as debtor to the company for premiums on all policies or renewal certificates procured through him, whether he received such premiums from the parties in whose

favor they were issued or not, and that he was not expected to account and pay to the company until a statement was rendered during the next succeeding month; that as between Tredick and the assured, the latter were not expected to pay in advance, but upon demand made by him a month or more after the insurance was effected. If such was the mutual understanding of the parties—and the jury has impliedly found it was—it would be a mere travesty of justice to hold that they neglected to pay the premium in question, and thus permit the company to shirk the payment of an honest obligation. It cannot be truthfully said the assured neglected to pay a premium which, according to the mutual understanding of all the parties, was not demandable before it was actually remitted to the party entitled to receive it.

The true answer to the narrow, technical defense interposed in this case is not that there was an actual waiver of the condition in question, but that there was a mutual understanding between the parties that, instead of a strictly cash payment of premiums at the time of effecting insurance, a short credit would be given by the company to its agent, and by him to the assured. This fact was so clearly and conclusively shown by the testimony that the jury, under the instructions given them, could not have done otherwise than find for plaintiffs.

It is unnecessary to consider the specifications of error in detail. The plaintiff in error has no just ground of complaint in regard to either of the rulings of the court. The evidence complained of was properly received and submitted to the jury with instructions which, in the main, are correct.

In the light of the testimony, and the facts which the jury must have found therefrom in reaching the conclusion they did, the defense is destitute of merit, and such as no reputable underwriter should ever insist upon. Judgment affirmed.

SUPREME COURT OF IOWA.

MYERS ET AL.

vs.

COUNCIL BLUFFS INS. CO.*

In case of partnership insurance it is sufficient compliance that the proofs are signed and sworn to by one of the partners.

In the absence of any showing to the contrary, a submission of the insured to examination is sufficient compliance with a policy-requirement to that effect, though it may not have been satisfactory.

An objection that the proof was deficient in form and substance, without specifically showing in what respects, is too general.

When the application stated the value of stock to be \$4,000, and further that 'stock will be from \$4,000 to \$5,000,' parol evidence is admissible to show that the intention of the insured to increase the amount then on hand of \$1,700 to those figures was explained to the agent and was the meaning of the application.

CHAS. S. FOGG and SAPP & PUSEY, *for Appellant.*

KAUFFMAN & GUERNSEY, *for Appellee.*

SEEVERS, J.

1. The defendant pleaded that the plaintiff had failed to furnish it with proofs of loss, as is required by the terms and conditions of the policy. The loss occurred on the eighth day of April, 1884, and immediately thereafter the plaintiff gave the defendant notice of the loss, and on the twenty-eighth day of said month furnished it with the required proofs of loss, as the plaintiff claims. The policy provides that, "as soon after the fire as possible, a particular statement of the loss shall be rendered the company, signed and sworn to by the assured." The objections to the proofs furnished are that they were

* Decision rendered, June 25, 1887.

neither signed nor sworn to by the assured. It will be observed that the assured is a partnership, and it is obvious that the proofs could not be sworn to by it and such we do not think is the meaning of the provision of the policy. The proofs furnished were signed and sworn to by one of the members of the partnership, and we think this a sufficient compliance with the conditions of the policy, in the absence of a specific objection that it was not so regarded by the defendant. The policy provides that the assured, when required, shall submit to an examination under oath, and the same shall be reduced to writing. On May 6, 1884, the defendant notified the assured that the proofs of loss received "is deficient both in form and substance. And we hold it subject to your orders; and we would here say that nothing falling short of a full compliance with section G, and more particularly part 3 of such section, will be recognized as proof under the policy in question." And the assured were required to submit to an examination under oath. Such examination was had, and we are not advised that the same was not full and complete, but possibly not satisfactory. Part 3 of section G of the policy refers to such examination; and, as the assured submitted thereto, we are unable to see why this was not a compliance with the conditions of the policy, in the absence of any showing that the same, in any respect, failed to comply with the policy. The only other objection made to the proof was that it was deficient both in form and substance. This is too general. The specific objection now relied on should have been then stated. Common fairness requires this much. *Wood, Ins.*, § 452.

2. The defendant pleaded that the "assured willfully, knowingly, and fraudulently overvalued the property insured," and claimed that, by reason of said overvaluation on the application, there was such a breach of the warranty, as to value, both in the application and in the policy, as rendered the policy null and void. The plaintiff replied that the defendant was estopped from making such defense, because, at the time the application was made and signed, the agent of the defendant was correctly informed as to the value of the merchandise on hand, and that the same would be increased by subsequent purchases. The insurance was for \$2,500, and the defendant insists the value of the stock was fixed at \$4,000, when it was in fact about \$1,700 at the time the insurance was effected. The plaintiff concedes that the value of the stock was about \$1,700, but denies that it was ever represented or warranted that the stock was of any greater value when the application for insurance was made. In an

amended abstract, which is not denied, it is stated that the application in the respect mentioned is as follows: "Cash values: Building (exclusive of ground), \$———. Annually, stock or merchandise, \$4,000. Other personal property, \$———. Yes. How often do you take account of stock? Annually. When last taken? Just commenced. What was the amount? Stock will be from \$4,000 to \$5,000. Do you keep merchandise and cash accounts? ——."

By consent of parties, the original application is before us, and from a careful examination of it we are unable to conclude that the statement in the amended abstract is not correct. It, therefore, in the absence of a denial, must be so conceded. The assured introduced evidence tending to show that the agent soliciting the insurance, and who filled the blanks in the application, was informed that the stock of goods at that time was of the value of about \$1,700, but it was expected to increase the value of the stock to the value named in the application. It is urged this evidence is inadmissible; but we think otherwise. It cannot fairly be said, we think, that such evidence contradicts either the application or the policy.

The statements made in the application may be said to be contradictory, but we think it cannot be said there is a positive statement as to the value of the goods. It is clear that the statement is that the value of the goods will be from \$4,000 to \$5,000. This excludes the thought that the then present value amounted to that, and we do not think that any one who read the application could reasonably reach the conclusion that there was any representation or warranty as to the value of the goods. Therefore, as there was no warranty as to such value, evidence to show what was said to the soliciting agent of the defendant was admissible for the purpose of showing there was no fraudulent representation. This, it seems to us, must be obvious, for the reason that the application on its face stated that the value of the stock would be from \$4,000 to \$5,000; and, if the present value was deemed by the defendant to be material, it was, by the terms of the application, put upon, and was bound to make, inquiry. Under the circumstances, we think the evidence in question clearly admissible, and within the rule in *Jordan vs. Insurance Co.*, 64 Iowa, 216, 19 N. W. Rep., 917, and *Donnelly vs. Cedar Rapids Ins. Co.*, 28 N. W. Rep., 607. Affirmed.

SUPREME COURT OF ILLINOIS.

Appealed from Third District.

HALDERMAN ET AL.

vs.

MASSACHUSETTS MUT. LIFE INS. CO. }

The payment of commissions to an agent for securing a loan, independent of the company, is not usurious.

A contract in a mortgage for the payment of reasonable attorney's fees in case of foreclosure, is not usurious.

MAGRUDER, J.

This case is brought before us by writ of error to the appellate court of the third district, which affirmed a decree of the circuit court of McLean County foreclosing a mortgage.

In January, 1876, Margaret A. Halderman borrowed of the Massachusetts Life Insurance Company through Tillotson and Waite, of Bloomington, \$3,600; she and her husband executing their bond to the company for that sum, bearing 10 per cent interest, and giving a trust-deed to secure the payment of the bond, upon the land described in the bill. At the time, John R. Halderman, husband of Margaret A., allowed to Tillotson and Waite a commission of 5 per cent, \$180, which was retained by the latter from the money. In January, 1881, the bond maturing, Halderman and wife made application to Tillotson and Fell, successors of Tillotson and Waite, for a renewal of the loan, which Tillotson and Fell obtained, and Halderman and wife gave their bond to the insurance company for \$3,600, bearing 8 per cent interest (the then highest legal rate of interest)

secured by trust-deed on the same land, receiving no money whatever. On this occasion Halderman paid to Tillotson and Fell a commission of \$80. The last-mentioned trust deed is the one foreclosed by the decree. The facts of this case, with the exception of the \$100 allowed for attorney's fees, as hereafter stated, are almost the same as the facts in the case of *Cox vs. Massachusetts Mut. Life Ins. Co.*, 113 Ill., 382. There a commission of \$150 was paid on the original loan, and a commission of \$75 for the renewal of the loan, and it was held that there was nothing of usury in the charge and payment of such commissions. The question in this case is whether, under a similar state of facts to that which is stated and discussed in the *Cox* case, the payment of the commissions above named of \$180 and \$80 constitutes usury. The opinion in the case referred to is decisive of the present case upon the question of usury. The trust-deed in this case contained a stipulation that a solicitor's fee of \$100 might be taxed as a part of the costs in case a bill should be filed to foreclose. We think, upon the authority of *Dunn vs. Rodgers* (43 Ill., 260) and *Clawson vs. Munson* (55 Ill., 394), that the circuit court committed no error in allowing the attorney's fee to be taxed as a part of the costs.

If such allowance by the master in his report to the circuit court had been an improper one, appellants should have called attention to it by an exception to the master's report, specially pointing out the objectionable item. This was not done. If such an exception had been filed before the master, the circuit court would have corrected whatever error, if any, may have been committed in taxing the fee.

Counsel for appellant claims that an agreement in a mortgage for an attorney's fee, such as is above set forth, is usurious. To sustain this claim, he refers to *Thomasson vs. Townsend*, 10 Bush, 114. The Kentucky case seems to support the view contended for by counsel, but it lays down a doctrine inconsistent with our decisions, and notably with the cases in 43 and 55 Ill., above referred to.

A contract in a mortgage that an attorney's fee which is reasonable in amount, may be taxed as a part of the costs in a suit to foreclose the mortgage, is not regarded as usurious in this State.

We have sustained such contracts as valid.

The judgment of the appellate court is affirmed.

COURT OF APPEALS OF KENTUCKY.

JACKSON ET AL.

vs.

ANDERSON ET AL.*

While life insurance policies are not ordinarily assignable like a promissory note, if a benefit-certificate assignable by its terms is assigned for land the assignee cannot claim to have the assignment set aside and to recover the land on the ground that it was not assignable.

WM. LINDSAY and JAMES D. BLACK, *for Appellants.*

DISHMAN & McCLEARY, J. H. TINSLEY, JOHN H. WILSON, and RICHARDS & HINES, *for Appellees.*

PRYOR, C. J.

After the re-argument in this case, the court is still disposed to adjudge that the appellant is entitled to a reversal. The parties were dealing at arms' length in regard to these policies, ~~the~~ seem to have had a marketable value. The husband of Mrs. Jackson was one of the beneficiaries, and, besides, the benefit-certificate on its face made the sum aid, at the death of the member, her assigns as well as those named as the beneficiaries. Lawyers had been consulted, and opinions given pro and con, as to the right to assign. That ordinary life policies are not assignable, and cannot be placed upon the market as a promissory note or bank paper, is well established; but here all the certificates issued by the grange purport to confer on the insured the right to assign, and it may well be doubted whether the corporation can make any defense to a bona fide holder who has been induced to purchase, not by the representations of the agents, that they were assignable, but by the express terms of the policy transferred.

Speculation was freely entered into by many parties in the county of Knox in these policies. Appellee, who should have informed

* Decision rendered, May 12, 1887.

himself as to the rights of the parties, was an active participant in the purchases made. He purchased this policy in 1877, and there was no complaint made until 1882, when it is apparent the members of the grange were being reduced in numbers, and the inducement to continue purchasing was not so great. There was never any tender of the policy back to the appellant, or any offer to pay the premiums that were unpaid; but, on the contrary, there was a forfeiture of the policy while in the hands of the appellee, and no notice, from the decided weight of the testimony, given by him of his intention to abandon the contract. He had a policy on his own life, besides others that he forfeited about the same time, and it was evident that the speculation was becoming a burden, and the cause prompting the appellee to sue consisted in the lessening of the ability of the corporation to pay by reason of its failing condition. He was offered by Vaughn \$500 for the policy, and by Parrott \$600. He asked \$1,800, and, if Mrs. Jackson had died, would have been entitled to \$2,000, in the event he acquired the interest of all the children. As to the husband's interest, he acquired that in the event he survived his wife; because the policy assigned by the husband and wife gave the right to assign, and estopped the husband from asserting any claim to the insurance money. The appellants, from the proof, have entered upon the land, erected buildings, improved the fence, and lived on it some five years before this suit was brought. That, from the preponderance of the proof, was the first notice appellants had of the purpose on the part of the appellee to seek a rescission of the executed contract. The land was worth not exceeding \$600. Mrs. Jackson could have sold her policy at any time upon a risking bargain for that sum. The appellee refused to sell it until he saw that it was becoming worthless, and, when in no condition to place these parties in statu quo, asks to have the contract rescinded.

This judgment is reversed and remanded, with directions to dismiss the proceeding as to Jackson and wife.

It appears that all of the children of Mrs. Jackson are of age but two. There are eleven children in all; and, as the mother has obtained the benefit of the policy by accepting for it a conveyance for this land, the appellee should be allowed to amend his petition, making the children defendants, and have the policy to be renewed by the corporation payable to the appellee.

Judgment reversed, and remanded for proceedings consistent with this opinion.

SUPREME COURT OF PENNSYLVANIA.

SIEGRIST
vs.
SCHMOLTZ.*

A policy, issued upon the life of A in favor of B, contained an agreement that A should not become a pauper so long as it was in force.

Held, That B, having otherwise no interest in the life of A, could only recover the actual amount expended for his support, on grounds of public policy.

A policy of insurance was issued upon the life of Siegrist; it contained an agreement by which Schmoltz agreed that Siegrist should not become a pauper as long as the certificate was in force. On the death of Siegrist the amount of the policy was paid to Schmoltz, whereupon an action of assumpsit was brought by the administrator of Siegrist against Schmoltz to recover. The verdict was for the defendant.

GORDON, J.

John Schmoltz, the defendant below, who was named as the beneficiary in the policy on the life of Jacob Siegrist, being neither a creditor nor near relative of the assured, took no interest therein, except as hereinafter stated. The court below fell into the error of holding that the question was one of good faith on part of the beneficiary. Now, says the learned judge, in his charge to the jury, "the question that we intend to submit to you is entirely a question of fact, namely: whether or not this transaction was speculative in its character; whether it was so on part of Schmoltz, because that is the important question. Whether it was on part of Schmoltz a specula-

* Decision rendered, October 4, 1886.

tion on the life of Jacob Siegrist, or whether it was a bona fide transaction; a transaction entered into on his part in good faith; upon good motives, charitable or benevolent motives; with the disposition to befriend the man who seemed to need friends; to support a man who seemed to need support; whether, in other words, the transaction is free from that taint which would make it void; namely, the taint of speculation."

But as we have intimated, the question is not one of good faith, but of public policy: *Downey vs. Hoffer*, 16 W. N. C., 185. The intention of John Schmoltz in obtaining this policy may have been innocent and pure, but this cannot be regarded, for the fact remains that he was in no way interested to maintain the life of Jacob Siegrist, and it is certain the sooner that life was extinguished the better it was, in a pecuniary point of view, for the beneficiary. Nor does it help the matter, but rather the contrary, that the defendant had charged himself with the support of Siegrist, for all the more would his pecuniary interest be advanced by the termination of Siegrist's life.

Doubtless the defendant, having entered into an agreement for the maintenance of the insured, might take a policy on his life in order to protect himself to the extent of that charge, even as a creditor may insure his debtor to the extent of his debt, for in that case he could gain nothing by Siegrist's death, though he might not be interested to maintain his life. It follows, that Schmoltz had an insurable interest in the life of Siegrist to the amount that he actually paid for his support, or which he advanced in money or otherwise, in fulfillment of his contract. So, in addition to this, would he be entitled to the money he expended in taking out and maintaining the policy; in other words, he must be fully re-imbursed for all his legitimate expenses, including lawful interest, and for the balance the administrator is entitled to a judgment. As what we have said in effect sustains all the assignments of error, we need not consider them in detail. The judgment of the court below is reversed and a new venire ordered. Judgment reversed.

UNITED STATES CIRCUIT COURT.

DISTRICT OF MASSACHUSETTS.

PHENIX INS. CO.

vs.

CHADBOURNE, ADM'R, ET AL.*

The agents of the owners of a vessel advanced, at the owners' request and for their benefit, the money necessary to enable the vessel to make a voyage, and took out a policy of insurance to secure the amount advanced. The vessel was lost, and the insurance money collected by the agents. *Held*, That the receipt of the money extinguished and satisfied the debt, and that neither under an assignment to the insurance company, nor under the doctrine of subrogation, could the company maintain an action against the owners to recover the amount from them.

The facts in this case were that the vessel was in Georgia, and it became necessary to raise money to put the vessel in condition to make a voyage to South America. Parsons & Loud, of New York, were agents of the owners, and advanced the money, taking out a policy of insurance to secure the amount thus advanced. The vessel was lost, and the insurance money collected by Parsons & Loud, and the plaintiff took an assignment of the claim. The defendant Chadbourne is administrator of the estate of Nehemiah Gibson.

C. T. RUSSELL, JR., *for Libellant.*F. DODGE, *for Respondents.*

NELSON, J.

It is perfectly clear, from the facts agreed upon in this case, that the insurance on the advances made by Parsons & Loud on the credit

Decision rendered, 1887.—From *Federal Reporter*.

of the vessel and freight were effected at the defendants' request, at their cost, and for their benefit, and that Parsons & Loud were bound by their contract with the defendants to apply the insurance money, when received, to the payment of the debt incurred on account of the advances. The receipt of the insurance money by Parsons & Loud, therefore, operated at once as an extinguishment of the debt, and they could thereafter have maintained no action against the defendants for its recovery. The debt having been thus satisfied, nothing, of course, passed by the formal assignment of the claim by Parsons & Loud to the libellant. For the same reason, by paying the loss the libellant acquired no right by way of subrogation to enforce the debt against the defendants. It could not, by paying the loss, get by subrogation a right which the assured did not possess, and it makes no difference that it had no notice of the arrangement between Parsons & Loud and the defendants when it issued the policy. All this has become settled law in this court by the recent decision of the supreme court in *Phoenix Ins. Co. vs. Erie & Western Transp. Co.*, 117 U. S., 312, 6 Sup. Ct. Rep., 750, 1,176. Libel dismissed, with costs.

SUPREME JUDICIAL COURT OF MAINE.

SWEAT

vs.

PISCATAQUIS MUTUAL INSURANCE COMPANY.*

Whether an erroneous description of title by misrepresenting that it was unincumbered, is material, is for the jury to decide.

CROSBY & CROSBY, *for Plaintiff.*

HENRY HUDSON and C. A. EVERETT, *for Defendant.*

WALTON, J.

Whether an erroneous description or misrepresentation of title in an application for insurance is or is not material is a question of fact for the jury, and not a question of law for the court. In this case, the plaintiff in her application for insurance stated that the property was unincumbered when in fact there was a mortgage upon it. The presiding judge instructed the jury that this misrepresentation was not material. This was error. The materiality of the misrepresentation should have been submitted to the jury: *Rev. Stats.*, chap. 49, § 20; *Bellatty vs. Ins. Co.*, 61 Me., 414.

Exceptions sustained; new trial granted.

Peters, C. J., Danforth, Emery, Foster and Haskell, JJ., concurred.

* Decision rendered, February 12, 1887.

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REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

UNITED STATES CIRCUIT COURT

SOUTHERN DISTRICT OF NEW YORK.

ALBERT H. CHADBOURNE

vs.

GERMAN-AMERICAN INS. CO.*

The policy was procured by N. on credit for the premium and made payable to J. as mortgagee. J. subsequently became owner and the policy was confirmed to him and made payable to C. as mortgagee. Notice was afterwards sent to J. and to C. that, unless the premium was paid on the following day, the policy would be canceled. No payment being made,

* Charge delivered, June 3d, 4th, and 6th, 1887.

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they were notified on the following day (Saturday), that the policy was canceled, and its return with the earned premium was demanded. The notices were received on Monday following, and about three hours later the loss occurred.

Held, That the obligation to pay the premium rested on N., whose undertaking to do so had been accepted by the company, and who had not been notified, and C. had no knowledge of such failure to notify, therefore C. was not guilty of fraud or default.

Held, That the cancellation would only be effective upon the lapse of a reasonable time after notice, to procure other insurance.

Held, That in order to make the cancellation complete, the company should have surrendered the obligation of N. given for the premium.

Before Hon. Hoyt H. Wheeler, district judge, and a jury.

This was an action upon a policy of fire insurance, covering certain lumber-drying machinery. The material portions of the policy were as follows :—

German-American Insurance Company of New York, in consideration of twenty-five dollars, and of the agreements and conditions herein contained, does insure Allen T. Nye & Co. to the amount of twenty-five hundred dollars.

New York, April 26th, 1886, loss, if any, payable to the Jennings Lumber Drying Company of New York and its assignees as their mortgage-interest may appear. J. A. Silvey, Sect'y.

May 6th, 1886, the interest in this policy is now vested in the Jennings Lumber Drying Company, owners, and loss, if any, payable to them. Charles E. and W. F. Peck, Agts.

May 14th, 1886, loss, if any, payable to A. S. Chadbourne as his mortgage-interest may appear. Charles E. and W. F. Peck, Agts.

1 Warranty of assured. * * * * * This policy shall become void, unless consent in writing is indorsed by the company hereon in each of the following instances, viz.: * * * * * if any change take place in the title, interest, location, or possession of the property (except in case of succession by reason of the death of the assured), whether by sale, transfer, or conveyance, in whole or in part, or by legal process or judicial decree ;

5. Relative to issue and cancellation of policy : * * * *

2. This insurance may be terminated at any time by request of the assured, or by the company on giving notice to that effect. On surrender of the policy the company shall refund any premium that may have been paid, reserving the usual short rates in the first case, and pro-rata rates in the other case.

6. Proceedings in case of loss. * * * 3. A particular statement of the loss shall be rendered to this company at its office in New York as soon after the fire as possible. * * *

6. This company shall not be liable for a greater proportion of any loss sustained by the assured upon any property described in this policy than the sum hereby insured thereon bears to the whole sum insured thereon, whether

such other insurance be by policies specific or otherwise, or whether prior or subsequent to this insurance, or whether such other insurance be valid or not, and without reference to the solvency of the other insuring companies. In the event of partially non-concurrent insurance, then to determine the liability of this company it shall be assumed that policies other than specific shall contribute with specific policies in the proportion that the loss on the property included in each item of the specific policies bears to the total loss for which the more general policies are liable. The adjusted claim under this policy shall be due and payable sixty days after the full completion by the assured of all the requirements herein contained.

* * * * *

9. It is hereby expressly provided that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or equity, until after full compliance by the assured with all the foregoing requirements.

ROGER FOSTER, *for Plaintiff.*

S. ST. JOHN McCUTCHEON, and W. D. MURRAY, *for Defendant.*

The plaintiff offered in evidence a chattel mortgage covering the insured property dated May 19th, 1886, executed by Richardson and Crosby. He then proved, that a similar chattel mortgage from the Jennings Lumber Drying Company to himself had been canceled in consideration of the execution of that by Richardson and Crosby; that a conditional sale had been made by the Jennings Company to Richardson and Crosby; that the latter had failed to perform the conditions, and that the title had reverted to the Jennings Company, which had not parted with the possession of the same. He also proved the loss by fire on August 26th, 1886, and the amount of damage to himself; the policy and the proofs of loss served November 4, 1886; that the day after the fire the plaintiff visited the office of the defendant and tendered the amount of the premium; that the defendant then refused to accept the money, stating that the policy had been canceled and lapsed for non-payment of the premium; and that subsequently the defendant refused upon the same ground to give plaintiff the customary blank form of proof of loss. Plaintiff then rested his case.

Defendant then moved for a direction of a verdict upon the following grounds:—

I. No consideration for the insurance has been proved.

(WHEELER, J.: The issue of the policy imports a consideration.)

II. The plaintiff must fail because he has not shown that his mortgagors, Richardson and Crosby, had an interest in the property at the time of the loss. It is well settled, that no mortgagee can

recover under a policy of insurance, unless his mortgagor could have done so, had the policy been payable to the latter: Jones on Mortgages, § 406; Friemansdorf vs. Watertown Ins. Co., 1 Fed. R., 68; Conn. Mut. Life Ins. Co. vs. Scammon, 4 Fed. R., 263; Carpenter vs. Providence W. M. Ins. Co., 16 Peters, 495; Grosvenor vs. Atlantic Fire Ins. Co., 17 N. Y., 391; Perry vs. Lorillard Ins. Co., 61 N. Y., 214.

The complaint should have showed that Richardson and Crosby were owners at the time of the fire.

III. The transfer to Richardson and Crosby, as it was not communicated to the defendant, avoids the policy under clause 1.

IV. The delay of the insured in serving proofs of loss avoids the policy under subdivision 3 of clause 6.

V. As the action was commenced on November 16th, only twelve days after the service of the proofs of loss, it was prematurely brought and must be dismissed. The policy requires sixty days' delay after service of the proofs of loss. See subdivision 6 of clause 6.

Plaintiff opposed as follows:—

I. As was said by the court during the argument, the issue of the policy creates the presumption of a consideration.

II. The cases cited by the defendant merely hold, that a breach of warranty by a mortgagor defeats the mortgagee under a policy like that on which we sue. They do not support the proposition maintained by the defendant.

III. The failure of the defendant to plead as a defense the conditional transfer to Richardson and Crosby prevents it from now relying upon it.

IV. The refusal of the defendant to recognize the policy as in force or to furnish the customary blank form for proof of loss, was under the authorities a waiver of their right to require proofs of loss: Life Ins. Co. vs. Pendleton, 112 U. S., 696, 709; Brink vs. Hanover Fire Ins. Co., 80 N. Y., 108; Home Ins. Co. vs. B. W. Co., 93 U. S., 546; Taylor vs. Merch. Fire Ins. Co., 7 How., Pr. (N. Y.), 390; B. & S. Wagon Co. vs. A. F. & M. Ins. Co., 13 Ins. L. J., 367.

In the same manner, the provision as to sixty days of grace after service of proofs of loss was also waived. Moreover, that provision manifestly applies only when there is other insurance, and a consequent adjustment is made.

Wheeler, J., denied the motion with leave to offer further evidence and subsequently renew the same.

The defendant then proved: that no premium had ever been paid upon the policy; that on Friday, July 23d, the insurance company had mailed to the plaintiff and the Jennings Lumber Drying Company notice that, unless the premium were paid on or before Saturday, the policy would be canceled; that these notices were delivered to the plaintiff, who was secretary of the Jennings Company, on Saturday morning; that Saturday afternoon the insurance company wrote in its books that the policy was canceled, and mailed to the same persons notices to that effect, which notices were delivered at 10 A. M., Monday, July 26th. The defendant also offered evidence tending to show a transfer of both the title and possession of the property from the Jennings Company to the Empire Drying Company.

The plaintiff in rebuttal offered evidence tending to prove that there had been no transfer of either the title or possession of the property, but merely an executory agreement to sell it to the Empire Drying Company; that the fire occurred about 2 P. M. on Monday; that on account of the character of the property it would have required two or three days to effect new insurance upon it; and that the president of the Jennings Lumber Drying Company was absent from the city when the first notice was delivered on Saturday, and did not see it until he received the second notice, Monday morning, a few hours before the fire.

The defendant then renewed its motion for the direction of a verdict against the plaintiff upon the further grounds that the insurance company had exercised its option and duly canceled the policy, and that the agreement with the Empire Drying Company amounted to a breach of the condition against alienation of the property.

Plaintiff opposed on the following grounds:—

I. As to whether the contract with the Empire Company was a sale or an agreement to sell, and whether there was a change in the possession of the property; the testimony being conflicting, are questions for the jury.

II. The manuscript provision that the policy is payable to the plaintiff "as his mortgage-interest may appear," is a waiver of the printed clause against a change of title without notice to the company: *Ramsey vs. Phoenix Ins. Co.*, 1 Fed. R., 396.

III. As long as plaintiff's mortgage remained in force there could be no change in the title to the property. The word title means legal title. A chattel mortgagee, unlike a mortgagee of New York real estate, obtains the legal title to the mortgaged

property. Nothing is left with the mortgagor except a naked right of redemption. See Jones on Chattel Mortgages and cases cited. The transfer of such a right by the mortgagor is not a change in the title to the property.

IV. As long as plaintiff retained an insurable interest, there was no breach of the condition against alienation: *Hitchcock vs. N. W. Ins. Co.*, 26 N. Y., 68; *Savage vs. Long Island Ins. Co.*, 43 How. Pr. (N. Y.), 462; *Runney vs. Phoenix Ins. Co.*, 1 Fed. R., 396; *Planters' Mut. Ins. Co. vs. Rowland*, 16 Ins. Law Jour., 345, 349; *Kyte vs. Commercial Union Ass'e Co.*, 16 Ins. Law Jour., 330.

V. The policy was not canceled before the loss occurred. The plaintiff was entitled to reasonable notice of the cancellation. It must be admitted, that the policy would not authorize the defendant, if the building adjoining that of the insured should catch fire, to notify him forthwith that his policy was canceled. Were this the law, whenever a fire, such as devastated Chicago, Boston, and Portland, raged in the vicinity of insured property, the insurance companies would easily escape all liability. This cannot be the law. The word "notice" here, as elsewhere, means "reasonable notice;" that is, a notice giving the insured sufficient time to effect new insurance: *Wood on Fire Insurance* (2d Ed.), § 114; *Home Ins. Co. vs. Peck*, 65 Illinois, 111; *McLean vs. Republic Fire Ins. Co.*, 3 Lansing (N. Y.), 421. *Wilson vs. N. H. Fire Ins. Co.*, 16 Ins. Law Jour., 408, 409. The fact that no premium had been paid cannot change the construction of this clause. There is no other clause authorizing a cancellation for the non-payment of the premium. Whether the notice given to the plaintiff by the defendant was reasonable is under the circumstances of the case a mixed question of fact and law for the jury.

VI. *Nye & Co.* were the insured under the policy, and it could not be canceled without notice to them.

VII. The notice was defective because unaccompanied by payment to the insured of the balance of premium for the unexpired term: *Home Ins. Co. vs. Michigan*, 5 Ins. Law Jour., 120.

Wheeler, J., denied the defendant's motion in oral opinion substantially as follows:—

By the terms of this policy the assured had the right to have it canceled at any time by paying the customary short rate; the insurer had the right to cancel it at any time by returning a proportionate part of the premium paid, on giving notice. The insurance company couldn't cancel it in their own mind, so as to put an end to

it, until they should give notice to the assured. That notice must be actually given; it is not like notice of dishonor of commercial paper and some other notices which are given when the notices are mailed; that is not the effect of it. They are to actually give this notice; that is, give it to the party who is entitled to notice.

Now in this policy at this time it seems to me the parties entitled to notice were Mr. Chadbourne, the mortgagee, to whom the amount of his interest was payable, and the Jennings Lumber Drying Company, which was in effect the mortgagor. They were both entitled to notice, and the policy couldn't be canceled till they got notice; notice must be got to them. A notice that a policy will be canceled isn't sufficient; that is only a threat that lets them know; it is fair to let them know that it will be canceled at such a time, but that doesn't cancel it; notice must be given that it is canceled in fact.

The provision in the policy prescribes that it may be canceled on giving notice to those entitled to it; the notice must be actually had by them. Now these notices, if I remember the testimony aright, were received all together (that is, at the same time), by the persons who were entitled to receive them; one was mailed Friday toward night and the other Saturday toward night, that is, one for each of these persons entitled to it. The one mailed Friday was delivered Saturday, and the one mailed Saturday was delivered Monday, except to Mr. Page, who perhaps wasn't there to receive the Friday one. Mr. Chadbourne received the Friday one on Saturday, and the Saturday one on Monday, and according to the testimony, as I have got it in my mind, somewhere toward noon, between ten and eleven or between eleven and twelve. But somewhere toward noon Mr. Chadbourne and Mr. Page got this notice of the actual cancellation of the policy. The fire occurred at two o'clock the same day. He got notice along toward twelve o'clock, and about two o'clock the property insured by the policy was destroyed by fire. Now the question is whether that would cut off the policy so that it wouldn't be effective to insure against that fire. If they have a right to terminate the risk instantly it would. If that is the law and that is the meaning of this, that instantly they can say to a party "this policy is canceled," then it would. I have looked into the cases somewhat to see whether that is the law. I don't think it is. It has been decided the other way, that they cannot terminate the risk instantly; they must actually notify the party, actually give notice to him, either go and tell him or send some one to tell him,—if they take the risk of the mail they run the risk of its getting

there, it gets there when it does and when it does get there the party is notified. These registered letters finally got to Mr. Chadbourne, finally got to Mr. Page, about eleven or twelve o'clock, or towards noon, on Monday, and the fire was at two. If the building adjoining had been on fire, or a building up the block had been on fire when the notice got there, it wouldn't do to say that the company could cancel the policy when the fire was in sight. The notice must be a reasonable one and one that is given before the danger begins to come. The question here on this motion is whether the court can say as matter of law that the company having given notice that the policy is canceled before twelve o'clock, that didn't end the insurance. I don't feel warranted in saying that that is the law. I don't feel warranted in saying that they can do that instantly without giving the party any opportunity to make good what they take away from him, to make it good by insurance in some other way; I don't quite think that is the law. I think that question must be submitted to the jury to say whether that was reasonable notice. So you may discuss that question to the jury.

Then there is one other question, and that is the policy says in terms that it shall be terminated, become void, if there is a change in the title or possession of the property. Now, this isn't real estate, it is personal property; it doesn't require any deed, it can be changed by parol; there must be a sale, there must be a bargain, there must be an effective change, before that would void the policy.

As to the sale to Richardson & Crosby, the sale to them is not pleaded to avoid the policy. But I don't think that makes any difference; the sale to them was conditional, it was transferred to them, and they were to have this property, provided they paid. That is according to the testimony of Mr. Page. Mr. Chadbourne's mortgage which he had on the property before was given up, and a new mortgage by Richardson & Crosby given with the consent of the Jennings Lumber Drying Company, which would make his mortgage good; and that is of importance to show what his mortgage-interest is, and nobody questions, as I understand, but what his mortgage was good, that is he had a valid lien on the property to the amount of \$2,500; so that so far as the transfer to Richardson & Crosby is concerned, we have no trouble about that.

Then there is the transfer to the Empire Lumber Drying Company; and that is not so clear. There is a question of fact to be submitted to the jury as to that. They produce a contract in which it is recited that the property is sold, that the Empire Company bought it; and further along it is recited that the papers are to go into the hands of somebody as a custodian or trustee, I have forgotten the man's name now; but the papers are to go into his hands and they are to pay \$500 for the use of it, and it may be purchased afterward and it may not. You can't tell from the paper exactly how that is. But here is this recital that it is a purchase, and then here is the testimony of this witness Mr. Horack, the president of that company, who tells how they got it early in July, I think the 6th,—however, these papers are dated on the 23d or 24th; and then after the fire, which was on the 26th, they didn't claim the property, they let it go; and the other company, the Jennings Lumber Drying Company, took the fragments, what was left, the ruins, the irons, and sold them. That looks as if there wasn't any sale.

Now I think it must be submitted to the jury to say whether there was a real transfer of the interest or title of this Jennings Lumber Drying Company to the Empire Drying Company; and if there was, within the meaning of this policy—and about that I am not instructing the jury now—I am only saying it is a question—if there was, why that would avoid the policy. I shall explain more fully as to what would avoid the policy when the case goes to the jury. That is a question you may discuss to the jury.

Mr. McCutchen:—I want to call your honor's attention to what I think is an error, and that is your honor's suggestion on this contract with the Empire Company by providing that certain payments should go into the hands of Mr. Schenck as a trustee, indicates possibly that there was not yet a sale or only an attempted sale. Your honor is mistaken in this respect; what was to go into Schenck's hands as trustee was not the property; it was simply the chattel mortgage and the notes which the Empire Company within a period of time were at liberty to buy; not the contract or the property, but simply that.

The Court:—Very well; the paper itself will show. You will be at liberty to call that to the minds of the jury. The jury understand now that I am not undertaking to state the case to them.

Defendant's counsel excepts to the refusal of the court to direct a verdict for the defendant.

Mr. Murray thereupon summed up the case on behalf of the defendant; Mr. Foster on behalf of the plaintiff.

The court then charged the jury as follows:—

WHEELER, J. (charge of the court).

There are two questions, gentlemen, to be submitted to you, the decision of which by you will decide this case; one is as to whether under the terms of the policy the title or possession of the property was changed; and the other is whether a reasonable time had elapsed after giving notice of cancellation to avoid the policy.

Now as to the first one, this policy was so indorsed by the company, by the agents of the company, that it really became a policy of insurance to the Jennings Lumber Drying Company as mortgagors of this property, personal property, the loss payable to Mr. Chadbourne as mortgagee. He got his mortgage from Richardson & Crosby, but that was done with the consent and knowledge of the Jennings Lumber Drying Company, so that his mortgage was good; the insurance is payable to him "as his mortgage-interest may appear." How on the testimony, undisputed, his mortgage appears to be \$2,500, all good. Now, the insurance was for this Jennings Lumber Company; his mortgage was from Richardson & Crosby; that doesn't make any difference; they let Richardson & Crosby have it to mortgage; they understood it was to be mortgaged to replace their prior mortgage; still Richardson & Crosby were to have the property if they paid further for it, and they didn't pay for it; that is the testimony of Mr. Page; he says Mr. Chadbourne had a mortgage of \$2,500, and they had a right to give him this mortgage.

So in effect this Lumber Company was the mortgagor and Mr. Chadbourne was the mortgagee, and the policy was good to the Lumber Company as mortgagor and good to Mr. Chadbourne for his interest as mortgagee. That is all plain enough.

Now, there was a provision printed in the policy that if the title should be changed—and it is made the same for real estate that it is for personal estate—the effect of it is that if the title or possession shall be changed that shall avoid the policy. The reason of that is that if the title is changed these folks that are insured won't own it; they will have the policy on property that they don't own, and there would be a temptation to have it burned; they would have a chance to get the insurance and they wouldn't risk anything. Therefore that clause is put commonly in policies.

Now, a mortgage or lease of personal property doesn't change the title within the meaning of this clause. It is in evidence that they leased this to the Empire Drying Company; there is some evidence tending to show that. Now, that wouldn't avoid it; if they took possession of the property under their lease that wouldn't change the possession, that wouldn't avoid it; but if the property was sold by a bill of sale to the Empire Company that would end the policy.

Now there is the question: Was this property sold to the Empire Drying Company or only leased to them? There is one question for you, and if you find it was sold and the title gone from the Jennings Lumber Drying Company, then return a verdict for the defendant; if not, the plaintiff is to prevail as to this part of the case.

Now, on that you have this contract which was read to you, which recites that the Empire Company has purchased this property. Now, Mr. Page says that meant provisionally—purchased it if the purchase was carried through,—and he says the paper goes on further (and it was read and does appear to go on further) to say that the property is leased; that is, they were to have the use of it for \$500. Now, here is Mr. Horack, who says they bought it; you have seen both these witnesses on the stand and you have heard this paper read, and you have heard the testimony as to what was done after the fire, about who claimed the property, the remnants after the fire.

Now, take it all together, what do you think about that? Do you think the property was sold or not; that is, sold so as to transfer the title, or was it only provisional, to be a sale if something was done? If that is all there was to it, then the plaintiff is well enough as to that part of the case; if it was a sale so that the Jennings Lumber Drying Company had ceased to have an interest in the property and control of it, then that ends the policy and you must return a verdict for the defendant. Now that I leave to you.

I am asked to say to you that the burden is upon the plaintiff to show that. It is on the plaintiff to show this: that the assured had an interest in the property, an insurable interest. So it is on the plaintiff to show that the Jennings Lumber Drying Company had an interest in the property at the time of the fire as owners; that, though somebody else had a lease of it, they had ownership. Now if the plaintiff has shown you on this proof that the Jennings Lumber Drying Company still had an interest as owners in the property,

then your verdict should be for the plaintiff as to that part of the case; otherwise for the defendant.

Now, there is one other question and one only, and that is whether this policy was terminated by being canceled. You must remember that the payment of this premium has nothing in particular to do with that. They didn't have a right by the terms of the policy to cancel it because the premium wasn't paid; that is not it. They had a right to cancel it any time when they were a mind to, whether the premium was paid or not. They weren't obliged to deliver the policy till the premium was paid; they could have said "We won't let you have the policy until you pay the money," but they trusted them for the premium, they let it go on credit, and they have their debt against the one they let it go to for \$25 that wasn't paid. They had a right to cancel it because it wasn't paid; that was reason enough for them, because any reason was reason enough. Now, they were fair about it; they sent these notices to Mr. Chadbourne and to the Jennings Lumber Drying Company that if the premium wasn't paid they would cancel it. That didn't cancel it; it didn't cancel it then, nor it didn't cancel it when the time came, because they could change their mind and give them a little more time, or do anything they saw fit about it. When the time came they gave their notice; they gave notice that they had canceled it. These notices that were going to cancel it were delivered on Saturday, the 24th day of July, delivered to Mr. Chadbourne on Saturday. They said "We are going to cancel this policy unless the premium was paid." You remember what Mr. Page said; in the first place he said he wasn't in the city on Saturday, and then he said he remembered, come to see the paper, that he was just about going into the country and went so early he didn't get to these notices on Saturday. On Saturday later in the day they mailed notices that the policy was canceled. The mail-carrier says, and I have had his testimony read to me by the stenographer, that he delivered those to Mr. Chadbourne before 10 o'clock Monday morning; he started out about a quarter to 10 or 9:40, or somewhere along there, and got back about 10:15, and he delivered them about 10 to Mr. Chadbourne, and he signed these receipts. I think that was notice enough, because I believe Mr. Chadbourne was an officer in the Jennings Lumber Drying Company, secretary or something; so that would be well enough. Then Mr. Chadbourne was the mortgagee; so that is well enough. So that, although Mr. Page didn't get this notice until toward noon, I now say to you that the company and

Mr. Chadbourne both had notice by about 10 o'clock, on the evidence. Now then, this policy would expire on that cancellation within a reasonable time after; not immediately, not at once, but within a reasonable time to replace it; they couldn't cut it square off and leave him without any insurance in an instant, let what would happen; that wouldn't do; it would stand good for a reasonable time to replace it, to put himself in as good position as both parties expected he was in before that time.

The fire occurred that same day. Mr. Page in the first place said it occurred at noon; that is he says at noon the property was burned. Afterward he said it was consumed at two o'clock. The general current of the testimony after that was that the fire occurred about two o'clock that day. I mention this to you so that you will have this whole matter before you. When a reasonable time after Mr. Chadbourne had got these notices at 10 o'clock had expired, the policy was at an end. If that reasonable time had run out before the fire then your verdict should be for the defendant; if not, for the plaintiff. Now I leave to you to say how long a time would be reasonable after they got the notice to have that policy run out. They couldn't do it instantly; if they could, they could do it when there was a fire in the next block, and when there was any danger approaching and they saw fires coming, they could cancel it; that wouldn't do; that is not it; it is a reasonable time, and what is reasonable is the question for the jury. I leave it to you to say whether a reasonable time had elapsed so that the policy was ended before the fire. If so, return a verdict for the defendant. Or if the title to the mortgage had been changed, return a verdict for the defendant. But if you fail on either of these points to find for the defendant then return a verdict for the plaintiff.

As to expiration of the policy by cancellation the burden of proof is on the defendant to show that the policy had expired by cancellation before the fire. So if you are even on that you should find for the plaintiff. If you find for the plaintiff it is \$2,500, the amount of this policy, and interest from the time when, by the terms of the policy, it would be payable; there has been no computation furnished.

Mr. Foster:—That would be from the fire?

Mr. Murray:—No, it would be sixty days after the proofs of loss were filed.

The Court:—The interest would begin from sixty days after the fire. They couldn't make proof of the fire before the fire occurred.

The making of the proofs of loss was waived. That is, when the plaintiff went to the company and wanted papers to prove loss they said "We didn't insure you;" in effect they said, "there is no loss we are responsible for; we won't furnish you anything; take your own course." That waived the proof of loss. But the insurance wouldn't be due till sixty days after that; they would still have sixty days in which to pay. You can reckon that up. If you find for the plaintiff, reckon the interest on \$2,500 after sixty days from that time.

Mr. Foster:—I ask your Honor to charge to jury that the law does not take account of the fractions of the day; therefore in no possible event could the notice be good till the end of the day in which the notice was received.

The Court:—I will leave that as I have stated it.
(Plaintiff excepts.)

Mr. Foster:—I ask your honor to charge the jury that if that contract with the Drying Company was an agreement to sell it does not cut off any rights on the part of the insured; it must have been a sale.

The Court:—I have substantially told them that.

(At 10:50 A. M. the jury retired, and at 11:20 returned to the court room and rendered a verdict for the plaintiff in the sum of \$2,500, with \$107.53 interest.)

On June 17th, 1887, motion was made by defendants for a new trial on the minutes of the trial judge. Luke A. Lyckwood and W. D. Murray argued for the motion; Roger Foster opposed. The following decision was rendered by the court:—

WHEELER, J.

This action is brought upon a policy of fire insurance. It was originally procured by Nye & Co. on credit of the premium, and made payable to the Jennings Lumber Drying Company, mortgagees. This company became the owners of the property, and the policy was confirmed to them, and made payable to the plaintiff as mortgagee. It contained a clause providing that it might be terminated at any time on giving notice to that effect, and that on surrender of the policy the defendant should refund any premium that might have been paid, reserving pro-rata rates when terminated by the defendant.

On Friday the defendant issued a notice to the Jennings Lumber Drying Company that the premium remained unpaid, and that if it

was not paid on or before the next day the policy would be canceled, and sent the notice to that company, and a duplicate of it to the plaintiff, both of whom received it on the next day, at about ten o'clock. The premium was not paid by any one, and on that next day the defendant sent another notice to that company, and a duplicate to the plaintiff, that the policy was canceled, and demanding a return of the policy and payment of the earned premium. These notices were received by that company and the plaintiff on the next Monday, at about ten o'clock in the forenoon, and the property was destroyed by fire between noon and two o'clock of the same day.

The defendant resisted recovery on the ground, among others, that the policy was canceled, and notice given, before the loss. The court charged the jury on this subject, in substance, that the policy would continue in force until notice was given that it was canceled, and for a reasonable time thereafter for procuring other insurance to replace it. The jury returned a verdict for the plaintiff, and the defendant moved for a new trial because of this direction to the jury.

In *Wood on Fire Insurance*, sec. 107, it is laid down that "The insurer cannot be permitted to cancel a policy *instante*, except in case of fraud on the part of the assured or acts or omissions that amount to fraud on his part; but must give the assured a reasonable opportunity to secure protection by insurance elsewhere." None of the cases cited by counsel for the defendant involved the precise point, and they are not really in conflict with this proposition: *Stone vs. Franklin Ins. Co.*, N. Y. Court of Appeals, May, 1887; *Van Valkenburgh vs. Lenox Fire Ins. Co.*, 50 N. Y., 465; *Bergson vs. Builders's Ins. Co.*, 38 Cal., 541; *International Life Ins. Co. vs. Franklin Fire Ins. Co.*, 66 N. Y., 119; *Ætna Ins. Co. vs. Maguire*, 51 Ill., 531; *Grace vs. American Central Ins. Co.*, 16 Blatchf., 433.

The plaintiff in this case was not guilty of any fraud, or of any act or omission amounting to fraud, or tending in that direction. Neither he nor the Jennings Lumber Drying Company were under any obligation to pay the premium. The defendant had accepted the undertaking of Nye & Co. to pay the premium, and delivered the policy as if the premium had actually been paid, instead of withholding it until the premium should actually be paid; and the policy came to the Jennings Lumber Drying Company and the plaintiff as a valid policy, paid for. Nye & Co. on whom the obligation to pay for the policy rested, were not notified that the pol-

icy would be canceled if the premium was not paid; and the Jennings Lumber Drying Company and the plaintiff were not notified that Nye & Co. had not been so notified, and would not know that that the premium had not been paid by Nye & Co. until they received notice that the defendant had canceled the policy.

They are therefore not only not shown to have been guilty of any fraud, but of any default even. The defendant could unquestionably cancel the policy in the manner prescribed in it for the default of Nye & Co., or for any other cause, or without any cause, but had no claim upon any one else for the premium, and could not enforce payment from any one else, except by threatening to cancel the policy if payment should not be made. This part of the defendant's case rested therefore upon the right of the defendant to cancel the policy instantly, so as to terminate all liability upon it at that moment, which, according to this proposition, did not exist.

The defendant urges further in support of the motion that the question of reasonable notice should have been determined by the court and not submitted to the jury. This would probably be true if there were no question about the facts; but evidence was introduced tending to show that this property was of such a nature that insurance companies would not take a risk upon it without a survey, which could not have been had and insurance effected, after the first notice was given even, before the fire; and on the other side it was claimed that by the known usages of such business it could have been done in a very short time. On this there was a question of fact to be submitted to the jury as to how long it would take to effect an insurance, if any time was to be allowed for that purpose.

It is further to be noticed that by the terms of this policy it would be terminated on giving notice to that effect; but the premium was to be refunded only on surrender of the policy. These notices were sent by mail and the plaintiff and the Jennings Lumber Drying Company had no opportunity to surrender the policy and have an adjustment of the premium without seeking out the defendant for that purpose. No premium had been actually paid; but the defendant had the obligations of others for it, which had been accepted in lieu of it.

The right to cancel depends on pursuing very strictly the course prescribed, which includes the refunding of the premium, without requiring anything from the assured. This is shown by the cases cited by the defendant's counsel before referred to. If the note of the assured is taken for the premium, it must be refunded the same

as if money had been paid in order to terminate the risk: Wood on Fire Ins., sec. 106. The defendant did not surrender the obligation of Nye & Co., held for the premium, either to Nye & Co. or to the Jennings Lumber-Drying Co., or the plaintiff; but holds it still. On principle, it would seem that a surrender of that was a part of what was required to be done to effect a termination of the risk. If so, the plaintiff was entitled to a direction of the verdict in his favor as to that part of the case, and the defendant was not wronged by having it submitted to the jury. Motion denied.

UNITED STATES SUPREME COURT.

—¹—
*In Error to the Circuit Court of the United States for the District of
 Massachusetts.*
 —

PHENIX MUTUAL LIFE INS. CO. }

vs. }

RADDIN, Sp. ADM'R, ETC.* }

The application contained among others the following question: "Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party and in what companies? If already insured in this company, state the number of policy?" The answer was, "\$10,000, Equitable Life Assurance Society." The insured had applied for insurance elsewhere and had been refused.

Held, That the failure to state this fact was not a fraudulent suppression of facts or misstatement, even though intentional. The response was an answer to only one of the four questions and the company should have required answers to the others if it desired them.

The application provided that if the insured so far changed his subsequent habits as to make the risk more than ordinarily hazardous, the contract should be void.

Held, That acceptance of a premium after notice of such change was a waiver of forfeiture.

The declaration stated the consideration to be a certain sum and the payment of a certain annual premium, while the policy showed the representations in the application to be also a part of the consideration.

Held, That there was no variance.

M. F. DICKINSON, JR., for Plaintiff in Error.

R. M. MORSE, JR., and WM. M. RICHARDSON, for Defendant in Error.

* Decision rendered, January 31, 1887.

GRAY, J.

This was an action brought by Sewell Raddin, and prosecuted by his administrator, upon a policy of life insurance dated April 25th, 1872, the material parts of which were as follows: "This policy of assurance witnesseth that the Phoenix Mutual Life Insurance Company of Hartford, Conn., in consideration of the representations made to them in the application for this policy, and of the sum of one hundred and fifty-two dollars and ten cents to them duly paid by Sewell Raddin, father, and of the semi-annual payment of a like amount on or before the twenty-fifth day of April and October in every year during the continuance of this policy, do assure the life of Charles E. Raddin, of Lynn, in the county of Essex, State of Massachusetts, in the amount of ten thousand dollars, for the term of his natural life. This policy is issued and accepted by the assured upon the following express conditions and agreements," namely, among others, that "if any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, this policy shall be null and void." The application was signed by Sewell Raddin, both for his son and for himself, and contained twenty-nine printed "questions to be answered by the person whose life is proposed to be insured, and which form the basis of the contract," three of which, with the written answers to them, and the concluding paragraph of the application were as follows:—

(10) Is the party addicted to the habitual use of spirituous liquors or opium? No.

(28) Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the No. of policy. \$10,000, Equitable Life Assurance Society.

(29) Is the party and the applicant aware that any untrue or fraudulent answers to the above queries, or any suppression of facts in regard to the health, habits, or circumstances of the party to be assured, will vitiate the policy, and forfeit all payments thereon? Yes.

It is hereby declared that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned that this application shall form the basis of the contract for insurance, which contract shall be completed only by delivery of policy, and that any untrue or fraudulent answers, any suppression of facts, or should the applicant become as to habits, so far different from condition now represented to be in as to make the risk more than ordinarily hazardous, or neglect to pay the premium on or before the day it becomes due, shall and will render the policy null and void, and forfeit all payments made thereon.

It was admitted at the trial that all premiums were paid as they fell due; that Charles E. Raddin died July 18, 1881; and that at the date of this policy he had an endowment policy in the Equitable Life Insurance Society for \$10,000, which was afterwards paid to him.

One of the defenses relied on at the trial was that the answer to question twenty-eight in the application was untrue, and that there was a fraudulent suppression of facts material to the insurance, because the plaintiff, by his answer to that question, "\$10,000, Equitable Life Assurance Society," intended to have the defendant understand that the only application which had been made to any other company for assurance upon the life of his son was one made to the Equitable Life Assurance Society, upon which that society had issued a policy of \$10,000, whereas in fact the plaintiff, within three weeks before the application for the policy in suit, had made applications to that society, and to the New York Life Insurance Company, for additional insurance upon the son's life, each of which had been declined. The defendant offered to prove that the two other applications were made and declined as alleged, and that the facts as to the making and the rejection of both those applications were known to the plaintiff, and intentionally concealed by him at the time of his application to the defendant; and upon these offers of proof asked the court to rule—First, that the answer to question twenty-eight was untrue, and therefore no recovery could be had on this policy; second, that there was a suppression of facts by the plaintiff, and therefore he could not recover; and, third, "that the answer to question twenty-eight must be construed to be an answer to all the clauses of that question, and as such was misleading, and amounted to a concealment of facts which the defendant was entitled to know, and the plaintiff was bound to communicate." But the court excluded all the evidence so offered, declined to give any of the rulings asked for, and ruled "that, if the answer to one of the interrogatories of question twenty-eight was true, there would be no breach of the warranty; that the failure to answer the other interrogatories of question twenty-eight was no breach of the contract; and, that, if the company took the defective application, it would be a waiver on their part of the answers to the other interrogatories of that question." The jury having returned a verdict for the plaintiff in the full amount of the policy, the defendant's exceptions to the refusal to rule as requested, and to the rulings aforesaid, present the principal question in the case.

The rules of law which govern the decision of this question are well settled, and the only difficulty is in applying those rules to the facts before us. Answers to questions propounded by the insurers in an application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the applicant: *Moulor vs. American Ins. Co.*, 111 U. S., 385; s. c., 4 Sup. Ct. Rep., 466; *Campbell vs. New England Ins. Co.*, 98 Mass., 381; *Thomson vs. Weema*, 9 App. Cas., 671.

The misrepresentation or concealment by the assured of any material fact entitles the insurers to avoid the policy. But the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract: *Carpenter vs. Providence-Washington Ins. Co.*, 16 Pet., 495; *Jeffries vs. Life Ins. Co.*, 22 Wall., 47; *Anderson vs. Fitzgerald*, 4 H. L. Cas., 484; *Macdonald vs. Law Union Ins. Co.*, L. R., 9 Q. B., 328; *Edington vs. Aetna Life Ins. Co.*, 77 N. Y., 564; s. c., 100 N. Y., 536, and 3 N. E. Rep., 315.

Where an answer of the applicant to a direct question of the insurers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application: *Cazenove vs. British Equitable Assurance Co.*, 29 Law J. C. P. (N. S.), 160, affirming s. c., 6 C. B. (E. S.), 437. But where upon the face of the application, a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial: *Connecticut Ins. Co. vs. Luchs*, 108 U. S., 498; s. c., 2 Sup. Ct. Rep., 949; *Hall vs. People's Ins. Co.*, 6 Gray, 185; *Lorillard Ins. Co. vs. McCulloch*, 21 Ohio St., 176; *American Ins. Co. vs. Mahone*, 56 Miss., 180; *Carson vs. Jersey City Ins. Co.*, 43 N. J. Law, 300; s. c., 44 N. J. Law, 210; *Lebanon Ins. Co. vs. Kepler*, 106 Pa. St., 28.

The distinction between an answer apparently complete, but in fact incomplete, and therefore untrue, and an answer manifestly in-

complete, and as such accepted by the insurers, may be illustrated by two cases of fire insurance, which are governed by the same rules in this respect as cases of life insurance. If one applying for insurance upon a building against fire is asked whether the property is incumbered, and for what amount, and in his answer discloses one mortgage, when in fact there are two, the policy issued thereon is avoided: *Towne vs. Fitchburg Ins. Co.*, 7 Allen, 51. But if to the same question he merely answers that the property is incumbered, without stating the amount of incumbrances, the issue of the policy without further inquiry is a waiver of the omission to state the amount: *Nichols vs. Fayette Ins. Co.*, 1 Allen, 63.

In the contract before us the answers in the application are nowhere called warranties, or made part of the contract. In the policy those answers and the concluding paragraph of the application are referred to only as "the declarations or statements upon the faith of which this policy is issued;" and in the concluding paragraph of the application the answers are declared to be "fair and true answers to the foregoing questions," and to "form the basis of the contract for insurance." They must therefore be considered, not as warranties which are part of the contract, but as representations collateral to the contract, and on which it is based.

The twenty-eighth printed question in the application consists of four successive interrogatories, as follows: "Has any application been made to this or any other company for assurance on the life of he party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the No. of policy." The only answer written opposite this question is "\$10,000, Equitable Life Assurance Society." The question being printed in very small type, the answer is written in a single line midway of the opposite space, evidently in order to prevent the ends of the letters from extending above or below that space; and its position with regard to that space, and to the several interrogatories combined in the question, does not appear to us to have any bearing upon the construction and effect of the answer. But the four interrogatories grouped together in one question, and all relating to the subject of other insurance, would naturally be understood as all tending to one object,—the ascertaining of the amount of such insurance. The answer in its form is responsive, not to the first and second interrogatories, but to the third interrogatory only, and fully and truly answers that interrogatory by stating the existing amount of prior insurance, and in what company, and thus

renders the fourth interrogatory irrelevant. If the insurers, after being thus truly and fully informed of the amount and the place of prior insurance, considered it material to know whether any unsuccessful applications had been made for additional insurance, they should either have repeated the first two interrogatories, or have put further questions. The legal effect of issuing a policy upon the answer as it stood was to waive their right of requiring further answers as to the particulars mentioned in the twenty-eighth question, to determine that it was immaterial, for the purposes of their contract, whether any unsuccessful applications had been made, and to estop them to set up the omission to disclose such applications as a ground for avoiding the policy. The insurers, having thus conclusively elected to treat that omission as immaterial, could not afterwards make it material by proving that it was intentional.

The case of *London Assur. vs. Mansel* (11 Ch. Div., 363), on which the insurers relied at the argument, did not arise on a question including several interrogatories as to whether another application had been made, and with what result, and the amount of existing insurance, and in what company. But the application or proposal contained two separate questions,—the first whether a proposal had been made at any other office, and, if so, where; the second whether it was accepted at the ordinary premium, or at an increased premium, or declined; and contained no third question or interrogatory as to the amount of existing insurance, and in what company. The single answer to both questions was, "Insured now in two offices for £16,000, at ordinary rates. Policies effected last year." There being no specific interrogatory as to the amount of existing insurance, that answer could apply only to the question whether a proposal had been made, or to the question whether it had been accepted, and at what rates, or declined; and as applied to either of those questions it was in fact, but not upon its face, incomplete, and therefore untrue. As applied to the first question, it disclosed only some, and not all, of the proposals which had in fact been made; and, as applied to the second question, it disclosed only the proposals which had been accepted, and not those which had been declined, though the question distinctly embraced both. That case is thus clearly distinguished in its facts from the case at bar. So much of the remarks of Sir George Jessel, M. R., in delivering judgment, as implies that an insurance company is not bound to look with the greatest attention at the answers of an applicant to the great number of questions framed by the company or its agents, and that the in-

tentional omission of the insured to answer a question put to him is a concealment which will avoid a policy issued without further inquiry, can hardly be reconciled with the uniform current of American decisions. For these reasons, our conclusion upon this branch of the case is that there was no error of which the company had a right to complain, either in the refusals to rule, or in the rulings made.

Another defense relied on at the trial was that after the issue of the policy, Charles E. Raddin became, as to habits of using spirituous liquors, so far different from the condition he was represented to be in at the time of the application as to make the risk more than ordinarily hazardous, and thus to render the policy null and void. The bill of exceptions, after showing that in support of this defense the defendant introduced evidence, which it is now unnecessary to state, because the exception to its admission was abandoned at the argument, contains this statement: "In rebuttal of the foregoing defense of change of habits on the part of the assured after the issuing of the policy, the plaintiff not only denied the fact, but offered evidence tending to show that the defendant was informed of such change in habits prior to its receipt of the last premium, and that it gave no notice to Sewell Raddin of its intention to cancel the policy. Evidence to the contrary was introduced by the defendant, and the questions of change of habits, knowledge thereof by the company, notice to Sewell Raddin, receipt of premium after knowledge, and waiver, were all submitted to the jury."

The whole charge to the jury is made part of the bill of exceptions, in accordance with a practice which this court for more than half a century has emphatically condemned, and has by repeated decisions, as well as by express rule, constantly endeavored to suppress. As long ago as 1822, Mr. Justice Story, speaking for the whole court, said: "The charge is spread in extenso upon the record, a practice which is unnecessary and inconvenient, and may give rise to minute criticisms and observations upon points incidentally introduced, for purposes of argument or illustration, and by no means essential to the merits of the case." *Evans vs. Eaton*, 7 Wheat., 356, 426, 427. Opinions to the same effect have been delivered in many later cases: *Carver vs. Jackson*, 4 Pet., 1, 80, 81; *Ex parte Crane*, 5 Pet., 190; *Conard vs. Pacific Ins. Co.*, 6 Pet., 262, 280; *Magniac vs. Thompson*, 7 Pet., 348, 390; *Gregg vs. Sayre*, 8 Pet., 244, 251; *Stimpson vs. West Chester R. Co.*, 3 How., 553; *Zeller vs. Eckert*, 4 How., 289, 297; *U. S. vs. Rindskopf*, 105 U. S., 418. And

in 1832 this court adopted a rule which, with slight verbal changes, has ever since remained in force, by which it was ordered, not only that the judges of the circuit and district courts should not allow any bill of exceptions containing the charge of the court at large to the jury in trials at common law, upon any ground of exception to the whole of such charge, but also, "that the party excepting be required to state distinctly the several matters of law in such charge to which he excepts; and that such matters of law, and those only, be inserted in the bill of exceptions, and allowed by the court:" Rule 38 of 1832, 6 Pet., 4, and 1 How., 34; Rule 4 of 1858 and 1884, 21 How, 6; 108 U. S., 574, and 3 Sup. Ct. Rep., 5.

The disregard of this rule has caused the principal embarrassment in dealing with the question now under consideration.

The substance of the instructions to the jury on this part of the case was as follows: The judge directed the jury that if they should find that the assured was addicted to the habitual use of spirituous liquors at the date of the policy, or his habits afterwards changed in this respect so as to make the risk more than ordinarily hazardous, they would consider whether there had been a waiver on the part of the insurance company. The judge then told the jury that the plaintiff not only claimed that any misrepresentation as to the habits of the assured, or failure to inform the company of a change in those habits, had been waived by the company by accepting payment of a premium on or about April 25, 1881, after it had knowledge of the habits of the assured, or of the change in those habits, but further claimed that mere silence of the company, after knowledge of such change in habits, was a waiver of the violation of the provision of the policy; and the judge did charge the jury upon both the supposed grounds of waiver, instructing them that if the defendant had knowledge of the change in the habits of the assured before receiving the premium of April 25, 1881, the acceptance of that premium would be a waiver, which would estop the company to set up that the policy was forfeited for a breach of that provision; and further instructing them that if the company, having knowledge of the change in the habits of the assured, did not give notice to the plaintiff of that change, and he was prejudiced in any way by the failure of the company to give such a notice, and by reason of this silence of the company did any act, or omitted to do any act, which prejudiced him, there was a like waiver and estoppel on the part of company.

The bill of exceptions, after setting out the charge of the court, proceeds as follows: "To so much of the foregoing instructions as related to notice and waiver the defendant excepted, and asked the court to instruct the jury (1) that no notice of the cancellation of the policy or termination of the risk was necessary, if the jury find the fact to be that the habits of the assured had so far changed from the condition represented to be in as to make the risk more than ordinarily hazardous; (2) that even if any notice were necessary at all, under any circumstances, until the company had completed its investigations, if the company acted in good faith and with reasonable dispatch, they were not bound to give the notice; also that the receipt of the last premium, April 25, 1881, pending such investigations, would not amount to a waiver, especially if a much larger sum was tendered back when full knowledge was had by the company. The court refused these requests, and the defendant excepted thereto."

But the bill of exceptions does not state what the investigations and the tender were which are mentioned in the second request for instructions, or at what time or for what purpose either was made; nor does it show that any evidence had been introduced of prejudice to the plaintiff in consequence of the defendant's silence, or any other evidence upon the question of waiver, except that already mentioned, namely, that "the plaintiff offered evidence tending to show that the defendant was informed of such change in habits prior to its receipt of the last premium, and that it gave no notice to Sewell Raddin of its intention to cancel the policy," and that, "evidence to the contrary was introduced by the defendant." It does not, therefore, appear that the instructions requested, or the instructions given, except so far as they related to the effect of accepting payment of the last premium with previous knowledge of the habits of the assured, had any application to the case on trial. Except as just mentioned, the bill of exceptions is in the same condition as that of which Mr. Justice Miller, delivering a former judgment of this court, said: "There is in no part of this bill of exceptions any statement of the evidence. There is no statement that any evidence was offered, or that any was objected to. With the exception of the reference to it in the charge of the court, there is nothing to show what was proved, or what any of the evidence tended to prove. The prayers for instruction, therefore, may have been hypothetical, and wholly unwarranted by any testimony before the jury." *Worthington vs. Mason*, 101 U. S., 149, 151.

It follows that the only question upon the instructions of the court to the jury which is open to the defendant on this bill of exceptions is whether, if insurers accept payment of a premium after they know that there has been a breach of a condition of the policy, their acceptance of the premium is a waiver of the right to avoid the policy for that breach. Upon principle and authority, there can be no doubt that it is. To hold otherwise would be to maintain that the contract of insurance requires good faith of the assured only, and not of the insurers, and to permit insurers, knowing all the facts, to continue to receive new benefits from the contract while they decline to bear its burdens: *Insurance Co. vs. Wolff*, 95 U. S., 326; *Wing vs. Harvey*, 5 DeGex, M. & G., 265; *Frost vs. Saratoga Mut. Ins. Co.*, 5 Denio, 154; *Bevin vs. Connecticut Mut. Life Ins. Co.*, 23 Conn., 244; *Insurance Co. vs. Slockbower*, 26 Pa. St., 199; *Viele vs. Germania Ins. Co.*, 26 Iowa, 9; *Hodsdon vs. Guardian Life Ins. Co.*, 97 Mass., 144.

The only objection remaining to be considered is that of variance between the declaration and the evidence, which is thus stated in the bill of exceptions: "After the plaintiff had rested, the defendant asked the court to rule that there was a variance between the declaration and the proof, inasmuch as the declaration stated the consideration of the contract to be the payment of the sum of \$152.10, and of an annual premium of \$304.20, while the policy showed the consideration to be the representations made in the application as well as payment of the aforesaid sums of money, and that an amendment to the declaration was necessary; but this the court declined to rule, to which the defendant excepted."

But the "consideration," in the legal sense of the word, of a contract, is the quid pro quo; that which the party to whom a promise is made does or agrees to do in exchange for the promise. In a contract of insurance, the promise of the insurer is to pay a certain amount of money upon certain conditions; and the consideration on the part of the assured is his payment of the whole premium at the inception of the contract, or his payment of part then, and his agreement to pay the rest at certain periods while it continues in force. In the present case, at least, the application is collateral to the contract, and contains no promise or agreement of the assured. The statements in the application are only representations upon which the promise of the insurer is based, and conditions limiting the obligation which he assumes. If they are false, there is a misrepresentation, or a breach of condition, which prevents the obliga-

tion of the insurer from ever attaching, or brings it to an end; but there is no breach of any contract or promise on the part of the assured, for he has made none. In short, the statements in this application limit the liability of the insurer, but they create no liability on the part of the assured. The expression at the beginning of the policy, that the insurance is made "in consideration of the representations made in the application for this policy," and of certain sums paid and to be paid for premiums, does not make those representations part of the consideration, in the technical sense, or render it necessary or proper to plead them as such. Judgment affirmed.

UNITED STATES SUPREME COURT.

*In Error to the Circuit Court of the United States for the Southern
District of New York.*

NORTHWESTERN MUT. LIFE INS. CO. }

vs. }

MUSKEGON NAT. BANK.*

The application, which was a warranty, provided that the applicant "is not and will not become habitually intemperate."

Held, That the meaning of these words was a question for the jury. The burden of proof was on the company to show habitual intemperance.

Held, That instructions that a single or occasional excess does not make a man a drunkard, but a habit of life of indulging frequently with violence in excessive fits of intemperance, will justify such a finding, was sufficient under the circumstances. It would not be admissible to attempt to define to the jury approximately the frequency of indulgence.

Opinions of a witness as to the effect of habits four years later, are inadmissible. Evidence of a conversation with a physician four years prior to the issue of the policy regarding the insured's having a probable attack of delirium tremens, is inadmissible.

MILLER, J.

The Muskegon National Bank recovered a judgment in the circuit court of the United States for the southern district of New York, against the Northwestern Mutual Life Insurance Company, upon a policy of insurance on the life of Erwin G. Comstock for \$23,717.04, and to this judgment the present writ of error is directed. The bank had an insurance upon the life of Comstock, its debtor, for the sum of \$20,000. On the trial before the jury, although some other issues were made in the pleadings, the contest turned, so far as the

* Decision rendered, May 28, 1887.

assignments of error are presented here, on the condition of Comstock in regard to the habit of drinking alcoholic liquors. The policy and the application for it, the answers to which were signed both by Comstock and the bank through its president, present the foundation of the controversy. The sixteenth interrogatory is as follows: "Are you, or have you ever been, in the habit of using alcoholic beverages or other stimulants?" The answer to this was, "Yes; occasionally." The twenty-second interrogatory, "Have you read and assented to the following agreement?" was answered, "Yes." This agreement, so far as it touches the present issue, reads as follows: "It is hereby declared that the above are the applicant's own fair and true answers to the foregoing questions, and that the applicant is not, and will not become, habitually intemperate or addicted to the use of opium." The body of the policy declared that if Comstock shall become intemperate, so as to impair his health or induce delirium tremens, or if any statement in the application, on the faith of which the policy is made, shall be found to be in any material respect untrue, the policy is void.

Upon this language in the application and the policy the defendant founded two separate pleas or defenses: First. That "at the time of making and presenting said application as aforesaid, and of the issuing of said policy, the said Erwin G. Comstock was, and prior thereto had been, habitually intemperate, and that the said statement in said application contained, that said Erwin G. Comstock was not then habitually intemperate, was untrue and fraudulently made, and a suppression of facts material to the risk assumed by said policy of insurance." Second. That "said policy was issued by this defendant and accepted by said plaintiff, upon the express condition, among others contained therein, that if said Erwin G. Comstock should become either habitually intemperate, or so far intemperate as to impair health or induce delirium tremens, the said policy should be null and void; that, in fact, as this defendant is informed and believes, the said Erwin G. Comstock did, after the issuing of said policy, become habitually intemperate, and so far intemperate as to impair his health and induce delirium tremens; and that thereby the said policy became, and is, null and void."

The issues were tried upon the two allegations of habitual intemperance before and after the issue of the policy. The company, discharging other issues, assumed the affirmative on these two pleas, and on a plea of suicide, which seems to have been abandoned, and thereby obtained the opening and the conclusion to the jury. The

assignments of error raise objections to the action of the court in excluding answers to questions propounded to witnesses for the defendant company on the trial, as well as its refusal to give certain instructions prayed for by the defendant to the jury.

A witness for the defendant named Torrent, testified that he knew Comstock at Muskegon from 1868 to 1875. The policy of insurance was taken out in New York in 1879. The witness further stated that he was well acquainted with Comstock in Muskegon, and knew that he was addicted to the use of intoxicating liquors during the period of their acquaintance; had seen him drunk; knew of his being on prolonged sprees; and gave other testimony to the effect that he did use intoxicating liquors to excess. He was then asked this question: "Up to the time your acquaintance with him ceased, what would you say as to whether his drinking had affected his health or impaired his vital powers in any respect?" To this he answered: "I think it had affected him materially. I think it had affected his nerves and impaired his health generally—general debility. The symptoms of that were his general looks, and at the time he went away, or just before, he was taken very sick, and they didn't know whether he was going to be alive or die; that was the general impression." The court excluded this answer and the defendant excepted. Witness also testified that he saw him during that sickness, and that he was then sick for about three weeks, adding: "I think he had the delirium tremens." This expression of opinion was also excluded.

It is to be observed that the witness had testified to all the facts which he knew without objection, that tended to establish a habit of intemperance in Comstock prior to 1875. What he was next asked, and what he then testified to, was his opinion in regard to the effect of this intemperance upon the health of the assured. It will be noted that all this occurred between four and five years before the execution of the policy. We are of opinion that, while the facts recited by this witness, and received in evidence, might have some remote tendency to show Comstock's habits in regard to temperance at the time to which they related, his opinion of their effect upon his health at the date of the policy, four years later, was inadmissible as to that or his habits, as he knew nothing of these during that period.

The exception to the testimony of Barney, who undertook to detail conversations with a doctor attending Comstock prior to 1875, as to whether Comstock was threatened with delirium tremens or

not, and the statement of the witness that he was afraid Comstock was going to have delirium tremens, which was excluded by the court, depend upon the same principle, and are otherwise incompetent. We see no error in those rulings.

The remaining assignments of error have regard to prayers for instructions by the court to the jury, which were refused. No assignment of error is founded on any exception taken to the charge of the judge who tried the case, which seems to have been eminently fair and very full, and in our opinion embraced all that was necessary to be said to the jury on the subject. The questions which the jury had to respond to were whether Comstock was of intemperate habits at the time the policy was taken out, and whether he became habitually intemperate after that period. The whole case turned, so far as the jury was concerned, upon the true definitions of the words "habitually intemperate," taken in connection with the testimony on the subject, at these two different periods. The plaintiff was not bound to prove that the assured was temperate, or that he was a temperate man; but the defendant was bound to prove, not only that Comstock was intemperate at those periods, but that he was habitually so. This it was bound to do by such a preponderance of testimony as should satisfy the jury that at one of these periods or the other he was habitually intemperate. We do not know of any established legal definition of those words. As they relate to the customs and habits of men generally in regard to the use of intoxicating drinks, and as the observation and experience of one man on that subject is as good as another of equal capacity and opportunities, their true meaning and significations would seem to be a question addressed rather to the jury than to the court. While there may be on the one hand such a clear case of intemperate habits as to justify the court in saying that such and such facts constitute a condition of habitual intemperance, or on the other such an entire absence of any proof, beyond an occasional indulgence in the use of ardent spirits, as to warrant the opposite conclusion, yet the main field of inquiry, and the determination of the question within it, must be submitted to the jury, and the question on this submission must be decided by them.

The testimony in this case is all embodied in the record, and is contradictory. It must be divided into its relations to the two periods—before and after the execution of the policy. It is seen from the testimony that Comstock left Muskegon, where many of these witnesses resided who testify as to his excessive use of intoxicating

drinks prior to 1875, and that they know nothing of his habits after that. The policy was taken out in 1879. It is also quite clear that, under a pledge made to one of his partners in business, he had refrained from the use of intoxicating drinks from the first of June, 1878, up to the time of taking out this policy, and continued so to refrain up to March, 1880. There are several witnesses who testify that after his removal to New York in 1875 he was drunk, had spree once in a while, and perhaps several of them up to the time when he made this pledge to his partner. There are others who testify that after March, 1880, he was again seen intoxicated, and had spells of confinement on account of those sprees. On the other hand, there were four or five witnesses examined, some of whom were in the same building in which Comstock was employed in New York, who saw him daily, and transacted business with him for the two or three years prior to his death, which was in 1881, who testify that they never saw him drunk, or under the influence of liquor, and did not suppose he was addicted to drinking; but that he was a prompt, efficient business man, and that they had no suspicion that he was intemperate, or indulged in the excessive use of stimulants. Among these, Mr. Samuel Borrowe, vice-president of the Equitable Life Assurance Society, in whose building Comstock was a tenant, says that he saw him almost daily for two or three years prior to his death; that he struck him as a very energetic, active man; and that he never saw him under such circumstances as to suggest that he had been drinking.

Under these circumstances, and in view of this conflicting testimony, the following language of the judge in his charge to the jury in this case seems to contain all that was necessary for him to say by way of assisting them to arrive at a just verdict: "I think that there is no rule of law which says that, in order to make a man a drunkard, he must drink every day or every week to excess. Neither, on the other hand, does a single or an occasional excess make a man an habitual drunkard; but if you find that the habit and rule of a man's life is to indulge periodically and with frequency, and with increasing frequency and violence, in excessive fits of intemperance, such a use of liquor may properly cause the finding of habitual drunkenness. It is the fact of the certainty of these periodical sprees, accompanied with their frequency, which marks the habit. If a man should indulge in such a debauch once in a year only, it could not, in my opinion, properly be said that he was an habitual drunkard; he would be an occasional drunkard.

But if such debauches increased in frequency, and the certainty of their increasing frequency becomes established, then the time finally arrives when the line between an occasional excess and habit is crossed. It is for you to say whether Comstock was, at the time of the application, or became afterwards, the victim of such a habit. If you find that, after the making of the policy, Comstock became so far intemperate as to impair his health, the policy is avoided, and the verdict will be for the defendant."

At the request of the defendant, he also gave to the jury the following instructions: "If the jury find from the evidence that Erwin G. Comstock was habitually intemperate when the application for the policy of insurance was made, then they must find for the defendant. If the jury find from the evidence that Erwin G. Comstock became habitually intemperate after the issuing of the policy, then they must find for the defendant. If the jury find from the evidence that, after the making of the policy, Erwin G. Comstock became so far intemperate as to impair his health, then they must find for the defendant."

Exceptions were taken and errors assigned in regard to the following instructions, which were asked and refused by the court:—

First. "To be habitually intemperate it is not necessary that a person should be addicted to the excessive use of intoxicating liquors continually, or without interruption; but a person who, during a period of time sufficient to form a habit in that respect, is addicted to periodical 'sprees' of longer or shorter duration, when for days in succession he drinks intoxicating liquors to great excess producing a state of continued drunkenness until prostration and sickness compel a cessation, and terminate the 'spree,' comes within the definition of being habitually intemperate, although such person may remain sober for a month, three or six months, or even a year, at a time."

Second. "If the jury find from the evidence that for seven or eight years immediately prior to the seventeenth day of April, 1879, Erwin G. Comstock was addicted to periodical 'sprees,' when, for several days and sometimes for a week or more in succession, he would drink intoxicating liquors to great excess, producing a state of continued drunkenness until prostration and sickness intervened, then they must find for the defendant, although they may find that he would remain sober for a month, three or six months, or even a year, at a time."

Third. "It was the duty of the plaintiff and of Erwin G. Comstock, in their application for this policy of insurance, to communicate to the defendant the fact that for six or seven years immediately prior to the first day of June, 1878, Comstock had been addicted to periodical sprees, lasting for a longer or shorter period, when for days in succession he would drink intoxicating liquors to great excess, producing continued drunkenness, although he might remain sober for a month, three or six months, or longer even, at a time; and their failure to disclose such facts to the defendant avoids the policy, and the jury must find for the defendant."

Fourth. This includes two charges which amount to very much the same thing. They are in the following words: "If the jury should find from the evidence that, for six or seven years immediately prior to the first day of June, 1878, Erwin G. Comstock had been addicted to periodical sprees, lasting for a longer or shorter period, when for days in succession he would drink intoxicating liquors to great excess, producing continued drunkenness, until sickness and prostration would intervene and terminate the spree; that such sprees would occur once in every three or six months, or thereabouts; that on the first day of June, 1878, after the termination of one of such sprees, under threat of dissolution of partnership from his then partner, Mr. Hoagland, he gave a written pledge not to drink any more so long as he and Hoagland were associated in business; that his partnership with Hoagland ceased on the first day of May, 1879; that afterwards, during the years 1880 and 1881, he again became addicted to such periodical sprees; that during the year 1880 he had at least three such sprees; that during the year 1881, up to the latter part of April of that year, he had a number of such sprees of great intensity; that in one of those sprees, in or about the month of April, 1881, he subjected himself to the restraint of a nurse for several weeks in order to prevent himself from obtaining liquor, then the jury must find for the defendant. If the jury find from the evidence that, after the making of the policy of insurance, during the years 1880 and 1881, Erwin G. Comstock became addicted to periodical sprees, lasting for a number of days, or even a week or more, each time, when he would use intoxicating liquors to such excess as to produce continued drunkenness, and prostrate him and make him sick for several days; that such sprees occurred in or about the month of March, 1880, in or about the month of July, 1880, again in or about the month of August, 1880, again on or about the first of January, 1881, again in or about the

month of February, 1881, and again in or about the month of April, 1881; that his last spree in February and April, 1881, were of such intensity that toward the close of the drinking-period, when sick and prostrated, he subjected himself to nurses for a week and more each time, in order that they might assist him to become sober, then they must find for the defendant."

The first, second, and third of these prayers for instruction do not differ much from the substance of the charge of the court at its own instance. The language of that charge embodies the real principles upon which these three prayers are based, and in terms much more apt and just to both parties than that used by counsel. The court said, among other things: "Neither does a single or an occasional excess make a man an habitual drunkard; but, if you find that the habit and rule of a man's life is to indulge periodically and with frequency and with increasing frequency and violence in excessive fits of intemperance, such a use of liquor may properly cause the finding of habitual drunkenness." This is the substance, and in very strong language, of the three prayers above referred to for instruction which were refused by the court.

It has been often said by this court, and we repeat it now with emphasis, that if, in regard to any particular subject or point pertinent to the case, the court has laid down the law correctly, and so fully as to cover all that is proper to be said on the subject, it is not bound to repeat this instruction in terms varied to suit the wishes of either party: *Kelly vs. Jackson*, 6 Pet., 622; *Laber vs. Cooper*, 7 Wall., 565; *Indianapolis R. Co. vs. Horst*, 93 U. S., 291; *Railway Co. vs. McCarthy*, 96 U. S., 258. If the charge of the judge, made at his own suggestion, covers the point in question, it is much more likely to be impartial and correctly stated than it will be by counsel.

These requests, however, are inadmissible, as we think, for other reasons. They all, as near as they dare, attempt to define approximately for the jury the number of times a man must get drunk, or have a spree, or how closely such excesses must succeed each other, to constitute "habitual intemperance." They also attempt to say how long a time a man must have abstained from drunkenness or sprees in order to relieve him from that charge. And especially are the requests obnoxious in saying that, under such circumstances, a person comes within the definition of being habitually intemperate, although he might remain sober for a month, three or six months, or longer, at a time; one of them says, "or even a year at a time." What effect should be given to an entire abstinence from the use of

liquors for a whole year, in connection with occasional drunken sprees before or after, is not for the court to determine. But if it were, it does not seem to us, in view of this testimony, that sufficient force was given to it in the rejected prayers. This reference to periods of abstinence from drink is still more objectionable when it is seen, from the testimony, that during a continuous period, just before and after the taking out of this policy, Comstock was admitted to have been entirely sober, if not entirely abstinent from the use of ardent spirits, for a period of nearly two years. It would be rather harsh for a court to instruct a jury, as a matter of law, that a man who was sober nearly two years was at a period near the middle of that time "habitually intemperate." It was certainly a question to be left to the jury, on all the testimony, to draw their own conclusions in regard to the subject.

The two other requests are still more liable to these objections, inasmuch as they constitute an attempt to recite the various occasions on which the jury might infer that Comstock had been drunk, together with some vague description of the intervals between certain sprees, with an account of his struggles against his thirst for liquor; in fact, they are a history of his life for six or seven years prior to the making of the contract for insurance down to the time of his death; from all of which there is sought to be deduced a positive instruction to the jury that they must find for the defendant. We do not think there was anything in the case which would have justified the court in thus taking the determination of it from the jury. The court had no right in this summing up to ignore the testimony of four or five respectable and intelligent gentlemen who knew Comstock well during the most important part of this period, during several years of it, who saw him almost daily, and who testify that they never had any reason to suppose that he used ardent spirits at all, much less to excess. It was for the jury to weigh all these circumstances, and to determine, in view of them all, whether he was habitually intemperate.

There are very few decisions by courts of high character relating to this question. The principal one which has been brought to our attention, is *Insurance Co. vs. Foley*, 105 U. S., 350. In that case the insured, in answer to the question, "Is the party of temperate habits; has he always been so?" answered "Yes;" whereas the defendant company alleged that in fact he was a man of intemperate habits. The court, through Mr. Justice Field, said: "The question was as to the habits of the insured. His occasional use of intoxi-

cating liquors did not render him a man of intemperate habits, nor would an occasional case of excess justify the application of his character to him. An attack of delirium tremens may sometimes follow a single excessive indulgence. * * * When we speak of the habits of a person we refer to his customary conduct, to pursue which he has acquired a tendency from frequent repetition of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. * * * The court did not, therefore, err in instructing the jury that, if the habits of the insured, 'in the usual, ordinary, and everyday routine of his life, were temperate,' the representations made are not untrue, within the meaning of the policy, although he may have an attack of delirium tremens from an exceptional over-indulgence. It could not have been contemplated, from the language used in the policy, that it should become void for an occasional excess by the insured, but only when such excess had by frequent repetitions become a habit. And the testimony of witnesses, who had been intimate with him for years, and knew his general habits, may well have satisfied the jury that, whatever excesses he may at times have committed, he was not habitually intemperate." We think this language eminently applicable to the case before us.

The questions presented by these requests do not rise to the dignity even of mixed law and fact, but are questions, the answers to which are governed by no settled principle or rule of law, established either by statute or by a recognized course of judicial decision. They are emphatically questions of fact, which it is the province of a jury to decide, and in regard to which they are or ought to be as capable of making a decision as the court or anybody else.

The judgment of the circuit court is therefore affirmed.

SUPREME COURT OF ALABAMA.

FEARN, Ex'x, ET AL.)
vs.)
WARD, ADM'R.*)

A life policy taken out by a father when insolvent for the benefit of a minor child is not protected against the claims of creditors under the wife's-policy law of Alabama.

Held, That in the event of the father's death the measure of the creditor's interest is not the amount of premiums paid, but the amount of the policy.

WATTS & SON, L. WYETH, and HUMES, GORDON & SHEFFER, *for Appellants*.

CABANISS & WARD, *Contra*.

CLOPTON, J.

In July, 1873, Eliza Lee Fearn, as guardian of Kate Coles Fearn, received from the Piedmont & Arlington Life Insurance Company about \$9,500, being the proceeds of a policy of insurance issued by the company in July, 1870, on the life of Robert Fearn. The policy was payable to Kate Coles Fearn, who was an infant child of the assured. Eliza Lee Fearn loaned \$8,000 of the money received on the policy to James J. Donegan, who executed to her a mortgage on real estate to secure the payment of the loan. The bill is brought by appellee, as administrator of Thomas Fearn, to subject the money in the hands of Donegan to the payment of a judgment which was recovered by Eliza Levert, as executrix of Francis Levert, in April, 1871, against Robert Fearn. The judgment was founded on a bond

* Decision rendered, February 2, 1887.

for the payment of money, made by Robert Fearn and Thomas Fearn in 1857, and payable twelve months after date. Complainant, whose intestate was a surety on the bond, paid the demand, and the judgment was assigned to him as such administrator by the attorneys of record of the plaintiff, as authorized by the statute. Robert Fearn died in March, 1873, and his estate has been declared insolvent. The bill alleges and the proof shows a deficiency of legal assets to pay the demand. By section 3,418 of the Code, being the statute under which the judgment was assigned, the complainant is authorized to assert in law or equity any lien or right against Robert Fearn, the principal debtor, which the plaintiff in the judgment could assert if the debt had not been paid. A court of equity will intervene at the instance of a creditor, on averment and proof of a deficiency of legal assets, to subject to the satisfaction of his debt property fraudulently conveyed by a deceased debtor in his lifetime: *Battle vs. Reid*, 68 Ala., 149; *Sharp vs. Sharp*, 76 Ala., 312.

At the time the policy of insurance was procured, Robert Fearn had a wife and several children living. The policy was issued in favor of only one of his children. When this case was before the court on a former appeal, taken from a decree overruling a demurrer to the bill (65 Ala., 33), it was held that the policy is not protected against the claims of creditors by the statute which authorizes a married woman to cause the life of her husband to be insured for the benefit of herself and her children, free from the claims of the representatives of the husband or any of his creditors: Code, 1876, §§ 2,733, 2,734. It is said: "The policy, in this case, was procured by the husband in favor of one of his several children. The statute designed it for the benefit of the wife and children. It is not, therefore, in compliance with the requirements of the statute, and is not such a policy as justifies the invocation of the statute for its protection." The equity of the bill was sustained, which involved the right of the complainant to maintain the suit, and his title to relief, if the allegations were admitted or proved. The case, therefore, must be considered and determined on principles which apply independent of the statute.

The denials of the answers make it incumbent on complainant to prove that the premiums were paid by Robert Fearn with his own funds, and it is insisted that the evidence is insufficient to this end. Positive proof is not required. It may be established by circumstantial evidence. Neither is it incumbent on complainant to show the sources from which he derived the money. The agent of the

company testifies that all the premiums were paid by Robert Fearn, either in person, or by others for him. He was engaged in cultivating, in partnership with Ferguson, a large plantation from 1866 to 1872, inclusive. Humphrey, the agent of the commission merchants of the partnership, states that he made advances to Fearn, and paid premiums to the insurance company, which were charged to Fearn & Ferguson, and which they shipped cotton to meet. Eliza Fearn, his wife, and Coles, his brother-in-law, and the administrator of his estate, both state, they do not know from what source he derived the money to pay the premiums. The last premium was paid by Humphrey, and charged to Coles. On this evidence, we are forced to conclude, in the absence of opposing or explanatory proof, that Robert Fearn paid with his own funds all the premiums except the last. The effect of the manner in which the last premium was paid will be considered hereafter.

The procurement of the policy of insurance by Robert Fearn in favor of his child, and the payment of the premiums with his funds, constituted a gift to her,—a voluntary conveyance based on parental affection,—which is void as to his existing creditors, though no fraud may have been intended. It is a voluntary provision, effected by converting to her benefit money which in equity and good conscience should have been paid to his creditors. Though the law regards the parental duty of maintenance, and the consequent duty of making provision for the future, when the father may no longer exercise protecting care, it subordinates the discharge of these duties to obligations to his creditors; and declares void, as to them, any voluntary appropriation of property not authorized by legally expressed exemptions or privileges generally allowed on considerations of public policy. The bond on which complainant's intestate was surety had pre-existed, and was existing at the time of the creation and issue of the policy. The subsequent payment of the debt relates to the date of the suretyship, and constitutes him a creditor, who may avoid a fraudulent conveyance, though made during the period his claim was contingent: *Jenkins vs. Lockard*, 66 Ala. 337; *Keel vs. Larkin*, 72 Ala., 493. Whether complainant be regarded as a simple contract-creditor, or his rights arise from the provisions of the statute by authority of which the judgment was assigned to him, he is entitled to avoid, as offending his rights, the policy of insurance, unless some superior or equal equity of the beneficiary supervenes.

Such equity is claimed to arise on the following facts: Robert Fearn, Sr., died in 1856, leaving a will bequeathing and devising his entire estate to his wife, Eliza Maria Fearn, and Robert Fearn, who qualified as executrix and executor. Eliza Maria Fearn died in 1865, having made a will, giving her property in equal shares to Eliza Lee Fearn and her four children, Kate Coles Fearn being one of the children. Robert Fearn continued to act as executor of his father's will until October, 1870, when he resigned, and Weeden was thereafter appointed administrator de bonis non with the will annexed. Weeden, as such administrator, filed a bill against Robert Fearn for a final settlement of his administration of the estate of his father. Robert Fearn, having died pending the suit, it was revived against Robert Coles as his administrator, against whom a decree was rendered in December, 1873, for about the sum of \$54,000. It is insisted that, on these facts, Robert Fearn was indebted to Kate Coles Fearn when he caused the policy to be issued in her favor; that he had in possession funds which equitably belonged to her, out of which he paid the premiums; and that thereby a title to the policy vested in her immediately on its issue, founded on a valuable consideration.

A failing or insolvent debtor has the right to prefer, within proper bounds, one or more creditors to the exclusion of all others; and, if it is true that Robert Fearn was indebted to his daughter, he had the right to cause a policy of insurance on his own life to be issued in her favor as security for or in payment of such indebtedness, provided the limit of reasonable adequacy and sufficiency was not exceeded. And it may be that, her guardian having possession of the proceeds of the policy, a court of equity, in the absence of actual fraud, would regard her equity as equal to that of complainant, and require satisfaction of her demand, though the policy was intended as a voluntary provision: *Oliver vs. Moore*, 23 Ohio St., 473. But is she a creditor, in the meaning of these rules? She is not a legatee or devisee under the will of Robert Fearn, Sr., and has no claim or right to any of the property of his estate as such. The decree and the proceeds thereof constituted assets of his estate, the legal title to which was in his administrator, to whom the debt was due and payable. She could have maintained no suit to make Robert Fearn account for a devastavit as executor of his father's estate, and was incapable of acquitting or discharging him from such liability, or any part thereof. Her claim is under the will of Eliza Maria Fearn, to whose personal representative Weeden must

account for her portion of the personal assets of the estate of Robert Fearn, Sr. The relation of creditor and debtor does not arise on the facts, and we would have considered it unnecessary to allude thereto had not counsel strenuously contended for such relation as creating an equity in favor of Kate Coles Fearn. The same observations apply to the asserted equity, based on the possession and use in the payment of premiums of trust-funds. The relation of trustee and cestui que trust did not exist between Robert Fearn, as the executor of Robert Fearn, Sr., and Kate Coles Fearn as legatee and devisee under the will of Eliza Maria Fearn. Furthermore, it appears from the record that Robert Fearn resigned his executorship in October, 1870. Only one premium had been paid on the policy in question prior to his resignation,—the premium paid in August, 1870, at the time the policy was issued. The other premiums were paid subsequently, and when he did not have possession or control of the estate; and there is no evidence satisfactorily showing that he ever used the funds of the estate in the payment of any premiums.

But if it were true that Robert Fearn was indebted to Kate Coles Fearn, the extent of her equity would be the payment of such indebtedness. As the estate of Robert Fearn, Sr., owed no debts, Robert Fearn was entitled, under the will of his father, to one-half of the proceeds of the decree, and, by a sale of his interest in real estate \$25,000 were realized and paid on the decree. The amount of indebtedness, if any, is her distributive share, being one-fifth of the difference between the sum of one-half of the decree and the sum paid by the sale of the real estate. After satisfying the demand of complainant, there will remain in the possession of her executrix, of the proceeds of the policy, more than enough to pay this amount.

The remaining questions are the measure and kind of relief to which the complainant is entitled,—whether to subject the proceeds of the policy, or only a sum equal to the amount of premium paid by Robert Fearn, with interest, and to enforce the payment by a foreclosure of the mortgage? Appellants contend that the measure of relief is the amount of premiums paid, with interest; and rest the contention on the proposition that a contract for life insurance is an insurance for one year, with the privilege of continuing it in force by successive periodical payments of premiums; that is, each payment is a renewal of the contract, and, in a limited sense, the making of a new contract. Though this view has been taken

by respectable authorities, we think the position cannot be maintained. The contract of life insurance has its inception in the issue of the policy, and is a complete and entire contract for the life of the assured, continuing during life, and payable at death, when no earlier definite period is fixed; but subject to be discontinued by non-payment of the premiums as agreed, such payments being conditions subsequent. The annual premium is not paid in consideration of insurance for a single year, and its payment is not a condition precedent to renewal. Each premium constitutes a part of the consideration of the contract, as one and entire, and the amount is fixed and regulated by the prospective duration of the life of the assured, which enters as an element into the contract. As has been said, "The whole premiums are balanced against the whole insurance." On this character of the contract depends its continuance in force by a mere waiver of the discontinuance which would otherwise ensue on non-payment of the premiums, and on this construction are founded the decisions of this court respecting the interest which vests, when the policy is issued, in the person for whose benefit it is taken out: *New York Life Ins. Co. vs. Stratham*, 93 U. S., 24; *Drake vs. Stone*, 58 Ala., 133. It follows that the payment of the last premium, if made by Coles under the circumstances and for the benefit of the persons as testified by him, does not materially change the nature of the provision. The payment was made without the request, consent, or knowledge of the insured, or of the beneficiary. Payment by a stranger, without any agreement or understanding with the person entitled to its benefit, confers no interest or title to the policy: *Bliss, Life Ins.*, § 328. The last payment was made by Humphrey to the agent of the company of his own responsibility, and charged in a memorandum to Robert Fearn, and afterwards, by direction of Coles, was charged to him. Such assumption of the payment does not operate to render unavailing the provision by Robert Fearn, and convert the policy into a provision as made by Coles. His right or claim does not exceed re-imbusement of the amount paid.

The courts who construe the contract of life insurance as an insurance for a single year with a right or privilege of renewal may consistently hold that the creditor can only subject the amount of premiums paid by the assured, with interest; but, from our construction of the contract, the liability of the insurance, procured by the use of the means of the debtor, seems to logically follow. Property received by the grantee in exchange for that fraudulently con-

veyed will stand in place of the conveyed property, and may be subjected by the creditors of the grantor: *Abney vs. Kingsland*, 10 Ala., 355. If money belonging to a debtor, which should be paid to his creditors, is used in the purchase of property for the benefit of another merely on a good consideration, the property purchased becomes the property of the debtor, as to his creditors: *Pinkston vs. McLemore*, 31 Ala., 308. A father, who procures a policy of insurance to be issued on his life payable to his child, and pays the premiums with his own money, makes a voluntary gift or assignment of a portion of his estate, which constitutes an investment for the benefit of the person in whose favor the policy is issued. There can be no difference in principle between a policy thus procured and the assignment of a policy originally issued in his own name. On the death of the beneficiary, whether before or after the death of the assured, the fund arising therefrom will go, by bequest or succession, as other personal assets of the beneficiary: *Drake vs. Stone*, *supra*. The insurance constitutes the property purchased and is the subject-matter of the investment. If the father be in debt, such voluntary investment is fraudulent in law as to his existing creditors, without regard to his intent, or to his circumstances and condition as to ability to pay: *Caldwell vs. King*, 76 Ala., 149; *Anderson vs. Anderson*, 64 Ala., 403. In such case, the donee will be regarded as a trustee of the investment for the benefit of the creditors of the donor.

The cases in some of the States, which limit the relief to the amount of premiums, are founded on local statutes. We have no statute prescribing the measure of recovery in cases like the present; but, by the statute which authorizes a married woman to procure insurance on the life of her husband freed from the claims of his creditors, the amount of annual premiums which he may pay is limited to \$500; and it is provided that, if he exceeds the limit, the exemption shall apply to such insurance in the proportion of \$500 to the amount of premiums paid, without declaring what disposition shall be made of the excess of insurance. Under this statute it has been held that, if he exceeds the limit, the statute intervenes, and devotes the excess of insurance to the payment of his debts, on the ground that the statute fixes a limit beyond which the husband cannot pass in paying premiums from his own funds, which should be appropriated to his creditors: *Stone vs. Knickerbocker Life Ins. Co.*, 52 Ala., 589. This judicial interpretation of the statute can be maintained only on the principle that, without the statutory interven-

tion and exemption, the whole of the insurance would be subject to the payment of the debts of the husband. On settled principles, the conclusion follows that, if the subject of the gift or investment consists of a policy of insurance on the life of the debtor, the donee is liable for the money recovered on the policy: *Stokes vs. Coffey*, 8 Bush, 533; *Elliott's Appeal*, 50 Pa. St., 75; *Bliss, Life Ins.*, § 356.

It being shown that the guardian of the beneficiary loaned to Donegan \$8,000 of the money recovered on the policy, complainant may follow it into his hands, and make available the mortgage given as security for its payment. Section 2,908 of the Code, requiring suits to be revived within eighteen months after the death of a party, refers to actions at law, and does not apply to suits in chancery. Courts of equity, in the matter of the revival of suits, are governed by their own rules of limitation. The limitation usually is the time required to bar the cause of action, but subject to the discretion of the court, and may be diminished, when necessary to subserve the purposes of justice: *Ex parte Kirtland*, 49 Ala., 403. The failure to present the claim against Donegan's estate within eighteen months after the grant of letters of administration does not bar complainant's right to a foreclosure of the mortgage: *Inge vs. Boardman*, 2 Ala., 331; *Ware vs. Curry*, 67 Ala., 274; *Flinn vs. Barber*, 61 Ala., 530. Affirmed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

GIBSON

vs.

MANUFACTURERS' FIRE & MARINE INS. CO.*

In an action in Massachusetts upon a judgment recovered against an insurance company in New Mexico, it appeared that the laws of that Territory required any insurance company doing business there, to appoint an attorney at law in each county where its agencies were established, and to file with the Territorial auditor an instrument which should authorize such attorney to acknowledge service of legal process, and also consenting that any service of process on such attorney should be taken and held to be valid as if served upon the company; that the defendant duly filed such instrument, stating that the firm of K. & Co. were such attorneys, which instrument remained on file without being revoked at the time of bringing the original action. *Held*, that service of process upon K. was good, although in fact K. was not a member of the bar, and although the firm of K. & Co., consisting of K. and B., had been dissolved, K. carrying on business alone in the name of "K. & Co.," and although the firm, some months previous to the time of serving the process, had ceased to be agent for the defendant. *Held*, also, that the appointment was irrevocable, unless the revocation might be made by the appointment, duly notified upon the public records, of a new agent, who should be competent to receive service of process.

In an action in this commonwealth, upon a judgment recovered in one of the Territories of the United States, it is competent for the defendant to show, notwithstanding any recitals in the record to the contrary, that the court in which it was rendered had no jurisdiction of the subject-matter of the controversy or the party defendant.

Where the evidence of a foreign law consists entirely of a written document, statute, or judicial opinion, the question of its construction and effect is for the court alone.

Contract brought on a judgment of the district court of the Territory of New Mexico. Hearing in the superior court upon agreed facts, where judgment was entered for the defendant, and the

* Decision rendered, February 25, 1887 — From *North Eastern Reporter*.

plaintiff appealed to the supreme judicial court. The facts appear in the opinion.

L. M. CHILD, *for Plaintiff.*

This is an action upon a judgment of the district court for the Territory of New Mexico, a competent and superior court of jurisdiction, established by the laws of the United States. A judgment of the said court, being a court of record, and a suit being brought upon the same, the record of such court is accepted as binding and final, and cannot be questioned, except as to the jurisdiction thereof. The only question that is or can be raised upon the agreed facts is whether the court had competent jurisdiction of the defendant in this case. The defendant, having appointed an agent, is estopped from now claiming that the agent appointed by them was in violation of the law of the Territory: *La Fayette Ins. Co. vs. French*, 18 How., 408.

The defendant has no right to show that, by an agreement between itself and its agent, that his agency was revoked; such revocation not being notified to the plaintiff, or to the authorities of the State which required such an agency. The agency was for the protection of the inhabitants of the Territory, and could not be revoked at the will of the defendant.

The defendant appeared by attorney, in answer to the process served upon Kent. At first they appeared specially, and contested the sheriff's return. The motion to quash the return having been overruled, the attorneys were ordered by the court to plead to the declaration, which they did on July 5, 1885; on which plea issue was joined. This appearance by counsel, there being no suggestion that he had no authority from the defendant, or that they appeared fraudulently, is conclusive on the question of jurisdiction: *Hill vs. Mendenhall*, 21 Wall., 453; *Weeks*, Attys. at Law, § 199.

The court, once having had jurisdiction, cannot lose it because the attorneys withdraw their appearance, whether with or without the consent of the plaintiff's counsel. The attempt here, on the part of the defendant, after having tried his main point in the case before the court, and having been defeated, and then waiting four months to withdraw his appearance, that possibly he might have another opportunity before this court to try the same question, is exactly contrary to the purpose and theory of the law, and contrary to the constitution of the United States, and the laws for the enforcement of the same. The decision of the court of New Mexico, on the

question of the agency of Kent, is final and binding, and cannot under the law be re-opened by this court: *Freem., Judgm., §§ 130, 500, 563.*

J. C. GRAY and W. L. PUTNAM, *for Defendant.*

No action can be maintained on the judgment of a court of a foreign State, or of another State or Territory of the United States, unless such court had jurisdiction of the person of the defendant: *Gilman vs. Gilman*, 126 Mass., 26; *Wright vs. Andrews*, 130 Mass., 149; *Thompson vs. Whitman*, 18 Wall., 457. Statements as to service, in the record of such judgment, may be contradicted by parol evidence: *Carleton vs. Bickford*, 13 Gray, 591. Jurisdiction of a non-resident can only be acquired in one of two ways,—either by personal service of process within the jurisdiction, or by voluntary appearance. There was no service to give jurisdiction. Apart from the statute of New Mexico, and the instrument filed in the auditor's office, there could be no service on the defendant in that Territory. At common law, which, apart from statute, is the law of New Mexico, no court can acquire jurisdiction of a foreign corporation by service of process: *Andrews vs. Michigan Cent. R. Co.*, 99 Mass., 534. Even if a foreign corporation does not ever become subject to the jurisdiction of a court, by service of process on a person not appointed under a statute its agent for that purpose, it does not become so, in a State where it is not doing business, by service on a person who is not its agent for any purpose. If any authority is used for this, it will be found in *St. Clair vs. Cox*, 106 U. S., 350; 1, Sup. Ct. Rep., 354. Under the statute and the instrument filed in the auditor's office, there was no service on the defendant. No service was made upon the agents authorized by the instrument to receive service.

An authority to two cannot be exercised by one alone: *Sutton vs. Cole*, 3 Pick., 232, 244, 245; *Copeland vs. Mercantile Ins. Co.*, 6 Pick., 198, 202, 203; *Pennington vs. Morse*, Dyer, 62a. Nor is the principle altered by the fact that the duty imposed upon the agents is not one calling for any great exercise of discretion: *Pennington vs. Morse*, *supra*; *Sutton vs. Cole*, *supra*; Co. Litt., 49b.

One partner cannot receive service of original process directed against the firm. All Kent's powers to act on behalf of the firm were lost by the dissolution of the firm: *Dry vs. Davy*, 10 Adol. & E., 30; *Billingsley vs. Dawson*, 27 Iowa, 210; *Hartford Co. vs. Wilcox*, 57 Ill., 180; *Stewart vs. Rogers*, 19 Md., 98.

The authority given by the instrument had been revoked; and the defendant is not estopped to show this. The authority is revocable at the pleasure of the principal. The defendant is not estopped to show that the authority had been revoked. Three things are necessary to raise an estoppel against the defendant: (1) That the defendant should have made the statement; (2) that plaintiff should have known and believed that statement; (3) that she should have suffered legal damage by relying on it. "It is a general rule that a party cannot set up, by way of estoppel against another party, any act or declaration, unless by reason of such act or declaration he has been led to do or omit to do something which otherwise he would have not omitted or not done." *Plymouth vs. Wareham*, 126 Mass., 475, 478; *Fitch vs. Harrington*, 13 Gray, 468; *Pott vs. Eyton*, 3 C. B. 32; *Wood vs. Pennell*, 51 Me., 52. Even if the plaintiff did not know of the statement, and relied on it, she has suffered no legal injury.

The special appearance for the purpose of objection to the jurisdiction did not give jurisdiction: *Walling vs. Beers*, 120 Mass., 548; *Harkness vs. Hyde*, 98 U. S., 476; *Wright vs. Boynton*, 37 N. H., 9, 19. Pleading to the merits by order of the court, after the objection to the jurisdiction was overruled, did not give the court jurisdiction: *Walling vs. Beers*, *supra*; *Harkness vs. Hyde*, *supra*. The defendant's withdrawal of its appearance and plea by leave of court and consent of the plaintiff, replaced it in exactly the position it would have occupied had it never appeared or pleaded at all. See *Michew vs. McCoy*, 3 Watts. & S., 501; *Lodge vs. State Bank*, 6 Blackf., 557.

DEVENS, J.

The judgment sued upon having been recovered in one of the Territories of the United States, it was competent for the defendant to show, notwithstanding any recitals in the record to the contrary, that the court in which it was rendered had no jurisdiction of the subject-matter of the controversy or the party defendant: *Carleton vs. Bickford*, 13 Gray, 591. It is not contended that, apart from the instrument filed in the auditor's office of the Territory, there could be service upon the defendant in that Territory. The law of the Territory required any insurance company doing business to appoint an attorney at law in each county where its agencies were established, and to file with the Territorial auditor an instrument, duly signed and sealed, which should authorize such attorney to acknowledge service of legal process, and also consenting that any service of

process on such attorney should be taken and held to be valid, as if served upon the company.

On April 24, 1884, the defendant, undertaking to comply with this law, filed such an instrument, designating F. H. Kent & Co., whom it described as its agents at Albuquerque, upon whom process could be served. The firm of F. H. Kent & Co. consisted then of F. H. Kent and one Berks, neither of whom had been admitted to the bar as an attorney at law; but this cannot be important, as the defendant had adopted and treated them as its agents for the purpose stated as such: *La Fayette Ins. Co. vs. French*, 18 How., 408. On April 30, 1884, the firm of F. H. Kent & Co. was dissolved, and F. H. Kent continued to do business at the same place, under the name of F. H. Kent & Co., as the agent of defendant. Subsequent to this time the policy held by the plaintiff was effected through F. H. Kent; and it is upon him alone that the service was made on which the judgment is founded.

It is the contention of defendant that power to receive service was given to Kent and Berks by the appointment, and that service on Kent alone was not sufficient. But even if the partnership had continued, a service on one would have been sufficient. It was as the agent of the company to effect insurance that they were appointed as its agents to receive service of process. The ordinary business of a firm may be transacted by one partner, and he might alone acknowledge, for the company for which the firm was agent, service of process. To do this would be only an act which was required by the business the firm was transacting, and in its ordinary course. It is urged that, where a firm is sued, all the partners must be severally served with process, and therefore each must be so served when, as the agent for another, it is authorized to acknowledge or receive service of process. This by no means follows. The individual partner has not been made the agent of the other partner to receive service on him, while a principal, who has confided an agency to a partnership, may fairly be deemed to have intrusted to either the execution of those acts which do not, from their nature, require the concurrent action of all the partners.

Apart from these considerations it appears that, although Kent and Berks dissolved their partnership on April 30, 1884, F. H. Kent continued to do business under the firm name of F. H. Kent & Co., and continued the agent of the defendant, for the purpose of effecting insurance. The authority granted to the old firm was renewed to Kent alone, so far as conducting the business was concerned, and F.

H. Kent & Co. continued to be held out by the defendant by its notice in the auditor's office as its agent for doing business, as in fact Kent really was, and also as its agent to receive service. Conducting business through the agency of F. H. Kent & Co., after the dissolution of the original firm, and with full knowledge that Berks had retired, the defendant's agency was thus renewed to Kent alone, under that name, and continuing the notice in the Territorial office thereafter, was an adoption of him, under that name, as the person on whom process could be served. For a similar reason, the fact that, while no charge was made in the Territorial auditor's office, before service was actually made, the agency of F. H. Kent, as F. H. Kent & Co., was withdrawn, becomes unimportant.

The legislature of New Mexico had for its object the highly proper purpose of compelling companies, who established agencies and did business within the Territory, for the sake of the profits to be derived therefrom, to submit the controversies that must, from time to time, arise to the adjudication of the domestic forum. Where the evidence of a foreign law consists entirely of a written document, statute, or judicial opinion, the question of its construction and effect is for the court alone: *Kline vs. Baker*, 99 Mass., 253; *Ely vs. James*, 123 Mass., 36. The only evidence we have is the statute of New Mexico itself, which does not appear ever to have been the subject of judicial construction in that Territory. Taking into consideration its evident purpose, and its utter futility if a company, appointing an agent to receive service, could by an act known only to the agent and itself, withdraw his powers, it must be held that this appointment was irrevocable, unless the revocation might be made by the appointment, duly notified upon the public records, of a new agent, who should be competent to receive service of process in regard to any controversies arising upon contracts previously entered into. No such act as this was done when the service of process was made. F. H. Kent & Co. were still held out by the public records as the agent on whom process might be served.

The argument that it does not appear that the plaintiff ever knew of this appointment, that she was not deceived by it, and, therefore, that the defendant is not estopped from setting up that Kent was not its agent to receive service of process, does not impress us. She was a resident of the Territory, bound by its laws, and entitled to their benefits. She had a right to believe that the defendant had complied with the laws under which alone it had a right to do business there, and that otherwise it would have been restrained from

so doing. The act done by defendant, in publishing their notice in the office of the Territorial auditor, was a public one, for the benefit of all whom it might then or thereafter concern. Whether the plaintiff took the pains or not to inquire upon whom process should be served in case of controversy as to her policy, she was entitled to the benefit of the act thus publicly done, and the defendant cannot be heard, as against any one with whom it has contracted, and with whom it could only lawfully contract by compliance with the law of the Territory, to say that such compliance was pretended, or that it has since successfully evaded its operation.

Judgment for plaintiff.

SUPREME COURT OF RHODE ISLAND.

WILLIAM G. McQUITTY ET UX.

vs.

CONTINENTAL LIFE INS. CO.*

A married woman took out a policy of insurance on her own life payable ninety days after evidence of her death, or to herself if surviving at the end of fifteen years; all indebtedness to the company on account of the policy being first deducted. The premium was payable yearly, partly by note and partly in cash. The policy was to be void in case of default in payment of premiums, or of interest in advance on the premium-notes, or of the notes, provided that after two annual premiums had been paid the policy might be converted into a "paid-up" policy. In case the policy became void, all payments should be forfeited to the company. The policy contained on its margin, "Non-forfeiture endowment policy with profits." After paying two premiums in notes and cash the insured applied for a paid-up policy, released by quit-claim to the company all claims on the policy except as to 2-15 of its face amount, and received the same policy back from the company with a statement written on it that it was binding for 2-15 of its face, "subject to the terms and conditions expressed in this policy and in the quit-claim. . . ." She made no further payments on the notes she had given, either of principal or interest.

Held, That the policy was forfeited.

Held, further, that the marginal words, "Non-forfeiture endowment policy with profits," could not be read as a part of the contract.

Held, further, that such a policy was within the scope of Pub. Stat. R. I., cap. 166, § 21.

Held, further, that under Pub. Stat. R. I., cap. 166, a married woman could invest her separate estate in insurance on her life.

Held, further, that the policy was not void ab initio, though the premiums were in part paid by notes which as such did not bind the insured married woman who made them.

Held, further, that the company could set up the forfeiture by non-payment of interest in an action on the policy.

EDWARD C. DUBOIS, *for Plaintiffs*.

C. FRANK PARKHURST, *for Defendant*.

* Decision rendered, July 23, 1887.

DURFEE, C. J.

This is an action of assumpsit for money had and received to the use of the female plaintiff, Mary A. McQuitty, wife of William G. The action was begun in the court of common pleas and was there tried on an agreed statement of facts, from which the case appears to be as follows, to wit: The said Mary on November 16, 1870, being then and ever since then a resident of Rhode Island, procured in Rhode Island through its Rhode Island agent, F. W. Hart, a policy of insurance by which the defendant corporation agreed in consideration of the representations made in the application, and of the annual premium of \$87.49 to be paid every year on or before November 16th for the term of fifteen years, to insure the life of said Mary for her benefit in the sum of one thousand dollars, to be paid within ninety days after due notice and satisfactory evidence of her death during the continuance of the policy, or if she should survive November 16, 1885, to be paid then to her, deducting all indebtedness to the company on account of the policy, if any then existing. A note in the margin of the policy states that the annual premiums are payable \$34.99 note, 52.50 cash, each twelve months from November 16, 1870. The policy was issued subject to the condition that it should cease and determine in case of default on the part of the assured in paying the premiums, or interest in advance on the outstanding premium-notes, or the notes themselves at maturity, with the proviso, however, that if, after the payment of two or more of the annual premiums, the assured should make default in paying a subsequent premium, the company would convert the policy into a "paid-up" policy for as many fifteenths of the sum insured as there had been complete premiums paid, the application for conversion, with return of the policy, being made within one year after the default. The policy was also issued upon the express condition that in every case where the policy should cease, or be or become null and void, all payments thereon and all dividend-credits accruing therefrom should be forfeited to the company. The first two premiums were paid by said Mary in money and notes as required, and receipts therefor given to her by the company. In 1872 said Mary decided to make default and convert the policy into a "paid-up" policy for \$133.33, the pro rata amount stipulated for the premiums previously paid, and accordingly she remitted to the company \$4.20 interest on the two outstanding notes and applied for such policy, agreeing in her application "to pay to said company, annually, in advance, the interest on all outstanding notes given in part payment

of annual premiums." Thereupon, the company wrote across the face of the policy the following, to wit: "This policy having lapsed after two annual payments, is hereby recognized as binding upon the company for 2-15 thereof, or one hundred and thirty-three 33-100 dollars, subject to the terms and conditions expressed in this policy and in the quit-claim to the company bearing even date with this entry." Signed, "Robt. Beecher, Sec'y," and dated, "Hartford, Conn., November 16, 1872." The quit-claim referred to is a quit-claim or release expressed in the application to the company of all claims to the sum assured by the policy except the two-fifteenths.

Mrs. McQuitty never paid any further interests on the notes, and the notes are still outstanding unpaid. She demanded payment of the policy after maturity and the company refused it. The company claims that she has forfeited her policy and all moneys paid by her. She claims that being a married woman she was incapable of contracting, and is therefore entitled to recover the moneys paid by her under the policy. It is agreed that if the court find, on the facts as stated, the policy and moneys forfeited, judgment shall be for the defendant for costs, otherwise for the plaintiffs for \$—— debt or damage and costs. In the court of common pleas judgment was rendered for the defendant, and the case has been brought up on exceptions.

The policy has conspicuously displayed in the margin the words, "Non-forfeiture endowment policy with profits." There are cases which, regarding these marginal catch-words as an element of the contract, hold that the policy, at least when converted into a "paid-up" policy, is non-forfeitable: *Cowles vs. Continental Life Insurance Co.*, 63 N. H., 300; *Bruce vs. Continental Life Insurance Co.*, 58 Vt., 253. Other cases hold differently. In a recent case against the defendant company, decided by the Supreme Court of Connecticut, to wit, *Holman vs. Continental Life Insurance Co.* (2 New Eng. Reporter, 833), the sum insured was \$1,000; the period of time ten years; the annual premium, \$108.72, payable partly in cash, partly by note; the conditions the same as here. After the payment of two annual premiums partly in cash and partly in notes, which remained outstanding, the insured applied for a "paid-up" policy for \$200, agreeing to pay annually in advance interest on all outstanding notes. Thereupon, the company re-issued the policy indorsed as in the case at bar. The insured, after paying the interest twice more, stopped, and at the expiration of the term of the policy brought suit thereon. The court held that the "paid-up" policy was in ef-

fect a new policy on the conditions of the old, except in so far as the conditions of the old were inapplicable for the reason that no further premiums were to be paid, and that therefore it was forfeited by non-payment of the interest annually in advance on the outstanding premium-notes. The court, in rendering judgment, delivered an elaborate opinion, citing numerous cases in its support. We think its conclusion correct. There can be no doubt that the original policy was liable to forfeiture by such non-payment, unless its clear provisions are to be overruled because of a misleading phrase in its margin, as of course they cannot be without proof of fraud; and in our opinion the "paid-up" policy, both as re-issued and as provided for, is only the original policy reduced to an amount corresponding to the premiums paid, so that no further premiums are required. The expression "paid-up" as used in the provision for the conversion of the original policy into a "paid-up" policy is put in quotation marks, as if the expression were used to designate instead of characterize it; and if the expression be so regarded, there is little reason for supposing that the "paid-up" policy was intended to be anything other than the original policy converted by reducing it as stated, the conditions so far as applicable continuing unchanged. That the female plaintiff so understood appears from the terms of her application and from her receiving back the policy as indorsed. It seems to us that it is by laying undue stress on the expression "paid-up" that a contrary view has obtained. The use of an expression so likely to mislead cannot be too severely reprehended, but courts should not on that account give an effect to it which it is not entitled to. We see no reason to doubt that the female plaintiff, if capable of taking the original policy, was also capable of exchanging it under the provisions for conversion into the so-called "paid-up" policy.

The plaintiffs raise the question whether an endowment policy like the policy taken out by the female plaintiff is within the purview of our statute: Pub. Stat. R. L., cap. 166, § 21.* We see no reason to doubt it. Such a policy taken out by the assured on her own life,

* As follows: "Any policy or policies of insurance or part thereof which shall not exceed in the aggregate the sum of ten thousand dollars, made by an insurance company on the life of any person, and expressed to be for the benefit of a married woman, whether effected by herself or by her husband, or by any other person on her behalf, shall inure to her separate use and benefit, independently of her husband and of his creditors and representatives, and also independently of any other person effecting the same on her behalf, his creditors and representatives, and such policy may be sued in the name of the person beneficially interested therein, or in the name of the representative of such person."

insures it for a term of years. If she dies within the term, it is payable to her legal representatives. The fact that it is payable to her personally if she survives the term, does not make it any the less an insurance on her life, such payment being one of the considerations for taking the policy for such limited term: *Ætna Life Insurance Co. vs. Mason*, 14 R. I., 583.

The principal ground on which the plaintiffs claim to recover is that the policy was void *ab initio*, because the female plaintiff, being a married woman, was incapable of contracting, and consequently the premiums paid by her, being moneys paid upon a void consideration, can be recovered back as moneys paid to and for her use. The defendant contends that she was capable of entering into a contract of life insurance by force of the statute: Pub. Stat. R. I., cap. 166, § 21. The apparent purpose of this section, however, is not to enable married women to enter into such contracts, but to secure the policy to the extent of ten thousand dollars, when expressed to be for her benefit, "whether effected by herself or by her husband, or by any other person on her behalf," to her separate use, "independently of her husband and of his creditors and representatives, and also independently of any other person effecting the same on her behalf, his creditors and representatives." It is true the section recognizes that a policy of life insurance may be effected by a married woman, but we see no reason to doubt that, independently of section 21, under the other provisions of chapter 166, a married woman could invest her own money, being part of her separate estate, in a proper life insurance policy if she chose, as validly as in a piano-forte or a sewing-machine. If, for example, Mrs. McQuitty, instead of paying the first two premiums partly in cash and partly by note, had paid them wholly in cash, and then had taken out a paid-up, a really as well as nominally paid-up policy, we do not think there can be any question but that it would have been valid, and that she could oblige the company to pay it. The question then is, whether supposing she was incapable of binding herself personally by her promissory note, the policy was void because the premiums were paid partly in her notes. Suppose she had died in the second year of the original or in the first year of the "paid-up" policy, before committing any default, could the company have repudiated their contract and successfully resisted the payment of it. We think not. The company would have received the larger part of the premiums in cash and have secured the remainder by the right reserved in the policy to deduct it from the sum insured. That

they had taken notes from the assured which did not bind her personally would not avail them, since they must be presumed to have known her disability when they took them, and to have relied on their right to deduct and on the conditions of forfeiture as a sufficient protection. They could not be heard to say that the policy was without consideration: *Chamberlin vs. Robertson*, 31 Iowa, 408; *Abshire vs. Mather et al.*, 27 Ind., 381; *Glass vs. Warwick*, 40 Pa. St., 140. But if this be so, the policy was not void ab initio, and the company is entitled to set up the forfeiture by non-payment of interest in advance to defeat recovery upon it.

Exceptions overruled, judgment of court of common pleas affirmed with costs of this court,

SUPREME COURT OF FLORIDA.

HANOVER FIRE INS. CO. }

vs. }

LEWIS ET AL.*

A demurrer to evidence admits the truth of the testimony demurred to, and all reasonable inferences that may be drawn from that testimony.

When a demurrer to evidence is overruled by the judge, he cannot assess the damages that plaintiff has incurred. In such a case the judge, before discharging the jury, should require them to assess the damages conditionally, or, if he discharges the original jury, he should, upon overruling the demurrer to evidence, call another jury to assess the damages.

When this court holds that the issues were properly found on a demurrer to evidence in favor of the plaintiff, but the judgment of the court below is reversed on the ground that the presiding judge had no authority to assess the damages, the cause will, in the absence of other controlling reasons, be sent back with an affirmance of the findings of the judge, and instructions to call a jury to assess the plaintiff's damages; or it may, if the judgment on the demurrer in the court below is in favor of the defendant, and it is apparent from the record that the plaintiff had not disclosed the whole merits of his case, set aside the ruling of the judge below, and award a venire de novo.

When there is judgment in the court below in favor of plaintiff, and judgment is reversed on the ground that the judge had no authority to assess the damages, and it is apparent from the record that the defendant did not disclose the matters constituting his defense, because the plaintiff had omitted to introduce any evidence by which the jury could assess the damage the plaintiff had sustained, this court, in reversing the case, will award a venire de novo.

A policy of insurance against loss by fire, which provides that such loss shall be estimated according to the actual cash value of the property at the time of the loss, not exceeding the sum insured, leaves the question of value open; and, before a recovery thereon can be had for other than nominal damages, proof of the actual cash value of such property at the time of the loss must be produced to the jury.

* Decision rendered, March 23, 1887.

Where the assured party has made written proofs of loss as required by the policy, and delivered such proofs to the insurer, secondary evidence of their contents cannot be introduced by the assured, unless he has given notice to the insurer to produce such proofs, and he has failed to do so.

W. A. BLOUNT and FRED. T. MYERS, *for Plaintiff in Error.*

JOHN A. HENDERSON and R. W. WILLIAMS, *for Defendants in Error.*

McWHORTER, C. J.

The plaintiffs in error, B. C. Lewis & Sons, commenced an action in the circuit court of Leon County against the defendant in error, the Hanover Fire Insurance Company, on a policy of insurance. The language of this policy, so far as it is essential to a decision of this case, is as follows:—

\$5,000.

UNDERWRITERS' POLICY.

No. 20,195.

By this policy of insurance the Germania Fire Insurance Company and the Hanover Fire Insurance Company, each of the city of New York, each acting and contracting for itself, and not one for the other, in consideration of one-half part of the sum of one hundred dollars to each of them paid by the assured, hereinafter named, do each insure B. C. Lewis & Sons, Tallahassee, against loss or damage by fire to the amount of one-half part of the sum of five thousand dollars, for the term of three years, on their two-story, frame, shingle-roofed building on their plantation, known as "Glenwood," about seven miles northeast from Tallahassee, on the Miccosukie road, occupied by W. L. Robinson as his family residence, and each of the said companies agrees to make good to the assured, their executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum insured by said companies, as aforesaid, as shall happen by fire to the property above specified, from the eighteenth day of April, 1882, at noon, to the eighteenth day of April, 1885, at noon; the amount of such loss or damage to be estimated according to the actual cash value at the time of the loss, and to be paid sixty days after due notice and proof of the same made by the assured, and received at the office of the general agency of the said companies in the city of New York in accordance with the terms of this policy hereinafter mentioned.

The plaintiff introduced the following evidence,—the policy from which the extract above is taken, and also one Edward Lewis, who testified as follows: "I am one of the plaintiffs. The defendants issued to us, that is, to B. C. Lewis & Sons, this policy." "The property, Glenwood, described in said policy, was destroyed by fire, or it was reported to us, on January 2, 1885. I afterwards saw the place where it was burned, and saw that it was destroyed. The defendants furnished to us printed blank forms of proof of loss, which we filled out in writing, and returned to it, and they have ever since had it in its possession. [The attorney for defendant objected to the

question respecting the said writing, without the production of the writing, but the court, upon the argument of said objection, decided and delivered his opinion that the said question should be asked, and the said testimony was given as aforesaid. To which ruling of the court defendant excepted.] The defendants have never denied full knowledge of the destruction of the property by fire; that an agent or representative of the defendant was here soon after the destruction, and saw the wreck; that correspondence after the said fire passed between plaintiffs and defendants in reference thereto; that defendants have never paid or offered to pay plaintiffs the amount of the policy, nor any other sum, although asked to do so. I claim that the whole amount of the policy is due, and no part has been paid." The defendant then, upon cross-examination, asked the said witness what was the writing that he, or the firm of B. C. Lewis & Sons, had put into the said blank forms, but to the said question the attorney for the plaintiffs objected, and the said court did deliver its opinion, and decide to exclude the said question, and it was thereupon excluded, to which ruling of the court defendant excepted. This was all the evidence. The defendant corporation demurred to the evidence, the plaintiffs joined therein, and the jury were discharged. The judge found the issues in favor of the plaintiffs, assessed the damages, and rendered a judgment against the defendant corporation. The issues which were presented by the pleas of the defendant corporation, excepting the affirmative pleas, which are not involved here, the defendants having introduced no evidence to sustain them, are in effect the general issue, and that the plaintiffs had not given notice of loss in accordance with the requirements of the policy of insurance sued on.

Under the rule applicable to demurrers to evidence, which admits the truth of the testimony demurred to, and every reasonable inference that may be deduced therefrom, we are of the opinion that the court below was correct in determining those issues in favor of the plaintiffs. The court, however, went further, and assessed the damages which in its judgment the plaintiffs had sustained. This it had no authority to do. The rule from the earliest reported cases in England to the present day, and which prevails in this country, is that upon a demurrer to evidence the court may, before discharging the jury, cause them to assess the damages conditionally, that is, to fix the amount of the recovery, provided that the judge finds the issues in favor of the plaintiffs; or that he may discharge the jury, and, if he finds the issues in the evidence in favor of the plaintiffs, he must

call another jury to assess the damages, upon a writ of inquiry: 1 Tidd, Pr., 575; 2 Tidd, Pr., 866. In the case of *Obaugh vs. Finn* (4 Ark., 110), the court said: "Upon the filing of a demurrer to evidence, the usual course of proceeding is either to take a verdict for the plaintiff conditionally, and then discharge the jury; or to discharge the jury before any verdict is rendered, and then dispose of the demurrer, in which case if the demurrer is overruled, and the damages are unliquidated a new jury is summoned to assess the damages." In the case of *Young vs. Foster*, 7 Port. (Ala.), 420, the court said: "In case of a demurrer to evidence, it seems to be the most correct practice, on account of its dispatch, to direct the jury to assess the damages at the time the demurrer is taken, to be imposed in the event the demurrer is overruled. A new jury may, however, be impaneled to assess the damages, and either mode is legal." In the case of *Humphreys vs. West* (3 Rand., 516), the court said: "The only question for the court on a demurrer to evidence is whether the evidence supports the issue, and the judgment is that it does or does not support it." And, further: "After the demurrer is joined, the jury may either be discharged,—and (if the judgment be that the evidence does support the issue) a writ of inquiry of damages is awarded,—or the jury then impaneled may go on to assess conditional damages.

If it were otherwise, and the law permitted the court to assess the damages upon finding the issues in favor of the plaintiff, we should have been reluctantly compelled to have reversed the judgment of the court below, and have sent it back, with instructions to enter a judgment on the demurrer in favor of the defendant, or, at best, a judgment for the plaintiffs for merely nominal damages, for the reason that the policy is an open one, and the plaintiffs had failed to introduce any evidence whatever of the "actual cash value of" the property "at the time of the loss:" *May, Ins.*, § 30; *Lycoming Ins. Co. vs. Mitchel*, 48 Pa. St., 367; *Brown vs. Quincy etc. Ins. Co.*, 105 Mass., 396.

In sending this case back, we have been somewhat at a loss to settle the practice to be followed on another trial of this cause. In similar cases, where the court has held the issues to be in favor of the plaintiff, and has assessed the damages, and the cause has been reversed for this reason, the practice has been for the higher court to affirm the judgment of the lower one, and send the case back for the execution of a writ of inquiry merely to ascertain the damages. In *Patterson vs. Blakeney* (33 Ala., 338), the court say: "Follow-

ing the precedent established in *Boyd vs. Gilchrist* (15 Ala., 849), we shall not disturb the decision of the court below in so far as it overrules the demurrer to the evidence, and ascertains that the plaintiff is entitled to recover some damages, because to that extent the decision is correct. But, as the ascertainment by the court below was unauthorized, the judgment thus far, and to that extent, is reversed, and the cause remanded, that the court below may cause a jury to be impaneled to ascertain the damages." It also seems to be settled that where the plaintiff has not disclosed the whole merits of his case, either from some ruling of the court below, or from inadvertence, that the court, on sending the case back, will award a venire de novo: *Higgs vs. Shehee*, 4 Fla., 382; *Humphreys vs. West*, 3 Rand., 516; *Wheelwright vs. Moore*, 1 Hall, 225; *Gazzam vs. Bank of Mobile*, 1 Ala., 268. These cases expressly overrule the case of *Lea vs. Branch Bank*, 8 Port. (Ala.), 119.

In the case at bar, so far as the evidence went, the plaintiffs had shown a right to recover merely, but had introduced no evidence to show what amount they were entitled to recover. They closed their evidence. The defendant corporation was not bound to disclose its defense until a case had been made against it. We think counsel for defendant erred in demurring to the evidence; but, if he had gone to the jury, he could have properly claimed that they could only find a verdict against them for a nominal amount. To send the case back, with instructions to execute a writ of inquiry only as to amount of damages, and deprive the defendant corporation of presenting its defense, would be unjust to it, inasmuch as its failure to do so was attributable to the neglect or failure of the plaintiffs to make out their case. What we have said as to the effect of the evidence was based on the rule that a demurrer to evidence admits its truth. We do not desire to be considered as expressing any views of our own as to the weight of the same evidence in another trial.

With regard to the proofs of loss which plaintiffs claimed were in the possession of the defendant corporation, we think that a notice should be served on the defendant to produce them; and, if it fails to do so, that secondary evidence of their contents may be introduced: *Greenl. Ev.*, 560; *McFadden vs. Kingsbury*, 11 Wend., 667; *Faribault vs. Ely*, 2 Dev., 67, 68. In the absence of such notice to produce, secondary evidence of the contents is admissible.

Judgment reversed, and a venire de novo awarded.

SUPREME COURT OF PENNSYLVANIA.

BOATMAN'S FIRE & MARINE INS. CO.)

vs.)

HOCKING.*)

It is of no defense to an action brought upon a policy of fire insurance containing the usual clause against insurance in other companies, without consent, that the plaintiff did insure in other companies if the different policies do not legally cover the same property, although there may be some mingling of the goods.

Assumpsit by George H. Hocking against the Boatman's Fire & Marine Insurance Company of Pittsburgh, Pennsylvania.

On the twenty-ninth November, 1884, George H. Hocking, the defendant in error and plaintiff below, procured from the Boatman's Fire & Marine Insurance Company of Pittsburgh, Pennsylvania, the plaintiff in error and defendant below, a policy of insurance for the sum of \$1,000, "on counters, shelving, stoves, safe, desk, stools, and office-furniture, contained in a two-story, frame, tin-roof building, occupied for mercantile purposes and family residence, situate west side Centre Street, Meyersdale, Pa." The policy was to continue in force for one year from November 24, 1884, and contained, inter alia, the following provisions: " * * * Condition 3. Prohibition and conditions under which this policy becomes null and void. * * * And if the assured shall make any false representation as to the character," etc., "of the property," etc., "or shall have, or hereafter make, any other insurance on the property herein insured, or any part thereof, without notice to and consent of this company in writing hereon," etc., "then and

* Decision rendered, February 21, 1887.—From *Atlantic Reporter*.
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in every such case this policy shall be null and void. * * *

Condition 5. In case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured therein, whether such insurance be by specific or by general or floating policies. Reinsurance for any other insurance company to be on the basis of joint liability with said company, and in the event of loss this company to pay its proportion of said loss sustained by said company under their policy.

Condition 6. Proofs of loss. Persons having a claim under this policy shall give immediate notice thereof to the company, and, as soon thereafter as possible, render a particular account and proof thereof, signed and sworn to by them, setting forth (1) a copy of the written portion of this policy, and all indorsements thereon; (2) other insurance, if any, on same property, or any portion thereof, with copies of the written portion of each policy, and indorsements thereon; (3) the actual cash value of the subject insured at the time immediately preceding the fire; (4) the ownership of the property insured, and the interest of insured in the same; (5) for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used at the time of the loss; (6) if the claim be for loss on a building, the assured shall furnish a plan and specification of the building destroyed; (7) the date of the loss, the amount thereof; (8) how the fire originated, as far as said persons know or believe," etc., "and until such proofs as above required are produced, and examinations and appraisals permitted, the loss shall not be payable." On the margin of the policy, opposite the conditions, were these words, printed in large capital letters: "Take notice to the conditions of this policy."

George H. Hocking, the defendant in error, was the owner of the building containing the property insured. The counters and stools were attached to the floor and the shelving to the walls. He resided in the building, and the store was carried on by him and his brother William, in the name of Hocking Bros. On the eighth January, 1884, the firm of Hocking Bros. had obtained an insurance in the North British & Mercantile Insurance Company for \$1,500, of which \$500 was "on their counters, shelving, stoves, furniture, and fixtures contained on the first floor," and "all contained in a two-story, frame, tin-roofed building situate on the west side of Centre Street, Meyersdale, Somerset County Penn'a,

occupied as a general store and dwelling." This policy was to continue until November 24, 1885, and contained, *inter alia*, the very property which the defendant in error had insured in the policy in suit. The fact that there was an insurance on the same property was not made known to the plaintiff in error, nor was its consent obtained in writing on the policy in suit. On the fourth of December, 1884, the building was destroyed by fire, and all the property described in the policy was destroyed except the safe. The company shortly thereafter received notice of the fire through John D. Biggert, who had placed the policy. On the tenth December, 1884, Hocking Bros., per George H. Hocking, made statement of loss to the North British & Mercantile Insurance Company, which included all the store-fixtures. The statement was signed by George H. Hocking for the firm, and the affidavit thereto was made by him.

The store-fixtures were estimated at, - - - - - \$1,847 45
From this was deducted, as belonging to George H.

Hocking, the following.

280 ft. shelving, - - - - -	\$770 00	
220 ft. counter, - - - - -	330 00	
1 desk, - - - - -	80 00	
	<hr/>	\$1,180 00
		<hr/>
		\$667 45
Deduct depreciation, 30 per cent, - - - - -		217 45
		<hr/>
		\$450 00

This amount, together with the sum of \$650.70, amount of loss on household furniture, was paid Hocking Bros. by the North British & Mercantile Insurance Company. On the twentieth March, 1885, George H. Hocking made proofs of loss to the plaintiff in error, which included the shelving, at \$770, and the counter at \$440, other counters \$60, the safe at \$250, and other articles included in the proofs of loss to the North British & Mercantile Insurance Company. To this proof of loss there was a schedule attached, with the name "North British & Mercantile" written on, but giving no statement of the property insured in the North British & Mercantile Insurance Company, nor the amount insured, nor the amount received by them from the North British & Mercantile Insurance Company in settlement of their claim. The secretary of the Boatman's Fire & Marine Insurance Company had written Hocking requesting him to comply with the conditions of the policy. On the twentieth March, 1885, the proofs referred to were

made. Hocking brought this action on the first June, 1885. The principal point of defense was that the defendant company was not informed as to the former insurance on the same property; nor was its consent obtained and marked on the policy, as required by the terms thereof.

Defendant requested the court charge the jury as follows: "First, that the plaintiff and his brother having on the eighth of January, 1884, obtained a policy of insurance in the North British & Mercantile Insurance Company for \$500 on the property embraced in the policy in suit, which was not made known to the defendant company when the policy in suit was obtained, violated one of the clauses in the third condition in the policy, and therefore forfeited his right to recover in this case; second, that said insurance in the North British & Mercantile Insurance Company having been in the sum of \$500, and being on the same property, whatever sum the plaintiff remitted on the said claim should be deducted from the plaintiff's claim in this case; third, that the plaintiff having shown that he was the owner in fee of the building, the counters and shelves were part of the reality, and the plaintiff is not entitled to recover for them in this action; fourth, that, if the jury believe that the plaintiff did not give the notice required by the policy, he cannot recover; and the verdict must be for the defendant."

The court charged the jury as follows: "The first, second, third, and fourth points of the defendant we answer as one, by saying that we would have to refuse them all, and that we would be obliged to say to the jury that if they believe from the evidence that the company had notice of the loss immediately after the fire,—as to which the evidence of the secretary of the company, and any other evidence bearing on that subject, should be considered by them,—and if they also find that on the twentieth of March, 1885, a regular proof of loss was given, then we hold that such proof of loss was in a reasonable time, as no time is fixed in the policy; and, as the loss exceeds the amount of the policy, the verdict should be for the plaintiff."

Verdict and judgment for plaintiff, \$1,083; whereupon defendant took this writ.

W. H. KOONTZ, *for Plaintiff in Error.*

The conditions attached to a policy are part thereof: *Fire Association of Philadelphia vs. Williamson*, 26 Pa. St., 196; *Trask vs. Insurance Co.*, 29 Pa. St., 198; *Insurance Co. vs. Stauffer*, 33 Pa.

St., 369; Desilver vs. Insurance Co., 38 Pa. St., 181; Kensington Nat. Bank vs. Yerkes, 86 Pa. St., 227. Failure to notify the company of subsequent insurances upon the same property in other companies discharges the insurers: May, Ins., 437; Hutchinson vs. Western Ins. Co., 21 Mo., 97; Insurance Co. vs. Fay, 22 Mich., 467 Insurance Co. vs. Hurd, 37 Mich., 11; Insurance Co. vs. Lamar 106 Ind., 513, 7 N. E. Rep., 241.

COFFROTH & RUPPEL, for Defendant in Error.

There was no other insurance on the property insured by plaintiff in error: Sloat vs. Insurance Co., 49 Pa. St., 18; Stacey vs. Insurance Co., 2 Watts & S., 506.

PER CURIAM.

Although there was some mingling of the goods, yet the different policies did not legally cover the same property. In considering the substance of the case, rather than in looking at some of the irregular acts of the insured, we think no violence was done to the law by the answers to the points, nor in the charge of the court.

Judgment affirmed.

SUPREME COURT OF NEW HAMPSHIRE.

MORRISON

vs.

INSURANCE CO. OF NORTH AMERICA.*

Where a soliciting agent of the company was authorized by an applicant to receive and forward a policy to him, and such policy duly made out by a clerk of the general agent was placed where the soliciting agent generally kept his papers but was not forwarded.

Held, That the contract was completed if so intended.

Held, That the mere placing of such a policy in the desk of the solicitor without his knowledge, and withdrawing it without his knowledge, would not make a binding contract.

BINGHAM, MITCHELLS & BATCHELOR, and ALDRICH & REMICK, *for Plaintiff*.

BELDEN & IDE, and DREW, JORDAN & CARPENTER, *for Defendant*.

DOE, C. J.

January 31, 1871, the plaintiff, H. H. Morrison, who then was, and for some time had been, engaged in soliciting applications for fire insurance policies to be issued by the defendants, prepared and signed the plaintiff's application and sent it, with three others, to Hopkins, another solicitor of the defendants at St. Johnsbury, Vermont. The next day, February first, at St. Johnsbury, Hopkins left the four applications at the office of Shaw, a general agent of the defendants, authorized to issue policies. The jury found that Shaw accepted the plaintiff's application February first. Hopkins was authorized by the plaintiffs to receive their policy and forward it to them. At the trial the plaintiffs introduced a letter, dated February

* Decision rendered, July 29, 1884.

3, 1871, written and signed by Hopkins at St. Johnsbury, and sent by him to the plaintiff, H. H. Morrison, at Haverhill, New Hampshire, where the plaintiffs lived and where their property was situated, in which letter Hopkins says:—

Your applications for insurance for "the plaintiffs and three others" are received and insured from to-day. Amount of premiums, \$48.00. Four policies and stamps, \$7.00, \$55.00. Your com. 10 per cent on premiums, \$4.80, \$50.20. If not right please inform me. You will please have the pay ready and I will send by express Friday. I had to make some small alterations in your application.

The policy declared on, intended for the plaintiff, and dated February 6, 1871, was written by a clerk in Shaw's office and placed in a desk where Hopkins kept his papers, but was not sent to the plaintiffs. The jury found it was delivered to Hopkins as agent of the plaintiffs. Property described in the policy and application, and found by the jury to be of the value of \$1,009.35, was burned, February 10, 1871. The defendants paid the plaintiffs \$600, and the plaintiffs signed the following receipt written upon the policy:—

Received of the Insurance Company of North America, by the hand of Geo. S. Shaw, agent, six hundred dollars in full for all claims for loss and damage under this policy, and the same is hereby surrendered to the company to be discharged forever. St. Johnsbury, Vermont, February 28, 1871.

The jury found the settlement was obtained by the defendants' fraud.

The only material counts are in assumpsit, and all the counts in that form of action are on a written contract of insurance, described as a policy, signed, attested, and countersigned by the defendants' agents. On this contract the suit is brought more than six years after the alleged breach. To a plea of the statute of limitations, the plaintiffs reply the defendants' fraudulent concealment of the plaintiffs' cause of action, and the jury finds the defendants fraudulently concealed from the plaintiffs the existence of the insurance from February 1, 1871, to October 20, 1877.

"The very term policy imports that the party insured holds a written instrument to which that name has been given." Trustees vs. B. F. Ins. Co., 19 N. Y., 305, 308. The making of the contract declared upon, being denied by the general issue, is a fact to be proved by the plaintiffs; and this fact is not found in any part of the verdict except the affirmative answer to the question, "Was the policy delivered to Hopkins as agent for the plaintiffs?" Upon the facts stated in the case, this answer cannot be understood to mean anything less than that Hopkins was authorized by the plaintiffs to

receive the policy as their agent; that in the exercise of his authority as their agent he did receive it, and that, by its delivery to him, the contract declared on was made. If the verdict does not mean this, the essential fact of the making of the alleged contract is not found, and the defendants are entitled to judgment. The finding that the defendants concealed the existence of the insurance from the plaintiffs cannot be fairly understood to mean that the defendants concealed the existence of the policy from the plaintiffs' agent when they made the contract by delivering the policy to him. The plaintiffs sent their application to Hopkins to be presented by him to the defendants. By Hopkins' letter, which the plaintiffs received, they were informed that he had received their application; that he had to make some small alterations in it; that it had been accepted; that by its acceptance they were insured, and that he would send them the policy by express on a certain day, when they would be expected to pay the premium, less the commission of 10 per cent due one of the plaintiffs as soliciting agent. There is no room for a conjecture that Hopkins was authorized to conclude the contract by receiving the promised policy in ignorance of its existence.

Nothing is stated in the case tending to take the transaction out of the rule that knowledge and intention are the gist of a contract, and that the question whether the changed possession of a policy is a delivery binding the parties by making the contract written in it, is a question of knowledge and intention. There is such a delivery if both parties—or their authorized agents—understand the writing passes from one to the other as a token that the negotiation is concluded, and as evidence of an operative contract: *Canning vs. Pinkham*, 1 N. H., 353, 357, 358; *Barns vs. Hatch*, 3 id., 304, 307; *Warren vs. Swett*, 31 id., 332, 340; *D. Bank vs. Webster*, 44 id., 264, 268, 270; *Johnson vs. Farley*, 45 id., 505, 509, 510; *Tiede. Real Prop.*, §§ 812, 813, 814; *May, Ins.*, § 60. The case furnishes no indication of the defendants' being entitled to judgment on the ground that by reason of a lack of knowledge, intention, or understanding, on the part of the plaintiffs' agent, the delivery of the policy to him was not a delivery to the plaintiffs. On the fact found, Hopkins had authority to make the contract in behalf of the plaintiffs by receiving the policy; and the contract was made on their part, by his exercising that authority. By the contract thus made, reciprocal obligations were incurred: *May, Ins.*, § 61. The plaintiffs were bound to pay the premium. A suit brought by the defendants for the premium promised by these plaintiffs to be paid on delivery to them or their

agent, of a policy the existence of which was concealed from them and their agent, would present the difficulty of A's making a written contract with B, by delivering the writing to him, and concealing from him the delivery by which the contract was made: *Tasker vs. K. Ins. Co.*, 59 N. H., 438, 445.

On the facts presented by the case, the making of the alleged written contract by a concealed delivery and the writing is a contradictory and unmeaning expression. The legal possibility of a contract being so made in a hypothetical case need not be considered until there is a satisfactory foundation of fact for a claim that the rights of these parties depend upon a question of that kind. No fact is found by the jury, or stated in the case, and no suggestion is made in argument, on which the verdict can reasonably be understood to give any support to the position that Hopkins' valid exercise of his authority was concealed from him by the defendants; that he had no knowledge of the fact that he made the contract in behalf of the plaintiffs; or that, in contemplation of law, his knowledge of the delivery of the policy to himself as their agent was not their knowledge. The only reasonable and consistent interpretation of the verdict is the literal one that the delivery of the policy to the plaintiffs' agent, known to him, and assented to by him, was fraudulently kept from the plaintiffs' personal knowledge. In view of the reserved case, the suggestion—made in argument—that Hopkins did not see the policy, and that the defendants took it from his desk before he got actual possession of it, leads to no conclusion more favorable to the plaintiffs than this, the special finding of a delivery is contrary to the fact, the contract declared on was not made, and on this ground the defendants are entitled to judgment. But we are not at liberty to disregard the fact of delivery found by the jury. Under the circumstances disclosed, the defendants, by putting the policy in Hopkins' desk without his knowledge, and withdrawing it without his knowledge, would not make a contract on which they could recover the premium of the plaintiffs, or on which the plaintiffs could maintain this action.

By the policy, the defendants insured the property from February 1, 1871, to February 1, 1876. This is evidence that the plaintiffs' application was accepted February first, and that Hopkins was in error as to the beginning of the insurance of which he informed them, or that there was an error in the date—February third—of his letter. There was a provisional contract of insurance—containing an express or implied stipulation for a policy—made before

the policy was written: *Gerrish vs. G. Ins. Co.*, 55 N. H., 355; *Putnam vs. H. Ins. Co.*, 123 Mass., 324; *May, Ins.*, §§ 14-29; *Wood Ins.*, §§ 4-21. But this contract is not declared on; and it expired, by its own limitation, when the written contract was made by delivery of the policy. The preliminary agreement was to be performed within a year, and to be superseded by a policy retrospectively covering the short time between the acceptance of the application and the delivery of the policy. Of that agreement there has been no breach. It was fully performed, and was superseded by the delivery of the policy before the insured property was burned; Hopkins' letter, received by the plaintiffs, seems to prove it was not concealed from them; and the declaration excludes it from consideration. Judgment for the defendants.

Carpenter and Bingham, JJ., did not sit; the others concurred.

COURT OF APPEALS OF NEW YORK.

BENNETT

vs.

AGRICULTURAL INS. CO., OF WATERTOWN, N. Y.*

Where a finding of facts by a referee is sustained by the general term of the Supreme Court of New York, it is conclusive.

Misstatements made by the agent who filled the application as to vacancy, when correctly informed by the insured, will not work a forfeiture, where the agent acted within the scope of his authority, although the statements were made warranties.

A house was insured as unoccupied, but was afterward occupied temporarily and again vacated.

Held, That the subsequent vacancy did not work a forfeiture under a policy-provision against vacancy without notice. There was no obligation imposed on the insured as to occupancy under such a contract.

A. H. SAWYER, *for Appellant*.

D. A. KING, *for Respondent*.

ANDREWS, J.

The defense, based upon the statement in the application for insurance that the house at the time of the application was occupied as a residence by a tenant, when in fact it was vacant and unoccupied, was met on the trial by evidence on the part of the plaintiff that the application was taken by Kellogg, the solicitor and agent of the defendant, who furnished the printed form of application used by the defendant, and propounded the questions to the plaintiff, and assumed to enter in writing in the blanks left for that purpose in the application his answers; and that although Kellogg was correctly informed by the plaintiff that the house was unoccupied, but that when occupied it was occupied by a tenant or hired man, he untruly represented the plaintiff as answering that the house was occu-

* Decision rendered, June 21, 1887.

pied as a residence by a tenant, and that the plaintiff, supposing that the answers given by him to the questions were correctly entered, signed the application without noticing the misstatements. There was a conflict of evidence as to what occurred. The agent Kellogg testified that the answers were entered as given. The referee, however, found upon this issue in favor of the plaintiff, whose testimony was corroborated by several witnesses, and the finding, having been sustained by the general term, is conclusive in this court.

The agent Kellogg, in taking the application, was acting within the scope of his authority. He had been accustomed, with the knowledge of the defendant, to fill in the answers of applicants for insurance in the printed forms of application used by the company. Upon the case as it stands, it must be assumed that he was informed by the plaintiff that the house was unoccupied. His error in incorrectly inserting the plaintiff's answers cannot be imputed to the plaintiff, or deprive him of the benefit of the policy. If the plaintiff, as found by the referee, answered the question truly, he is absolved from responsibility. The misstatements in the application were, as between the parties, those of the defendant's agent, and not of the plaintiff, and did not constitute a breach of warranty by the assured. The authorities in this State are quite decisive in support of this view: *Rowley vs. Empire Ins. Co.*, 36 N. Y., 550; *Flynn vs. Equitable Life Ins. Co.*, 78 N. Y., 568; *Grattan vs. Metropolitan Life Ins. Co.*, 80 N. Y., 291.

The referee, pursuant to the prayer of the complaint, reformed the application by inserting the answers as given by the plaintiff, as of the date of the application, and the evidence justified this relief. The defendant insists that, treating the policy as having taken effect as a valid contract of insurance upon an unoccupied dwelling, there was a breach of condition subsequent contained in the policy which rendered it void. The policy was issued in August, 1876, for the term of three years. In April, 1878, a tenant was let into possession of the house, and occupied it until November, 1878, when he moved out, and the house remained unoccupied from that time until the fire, July 17, 1879.

The claim is that, although the house was insured as unoccupied, yet, as the plaintiff afterwards, during the life of the policy, occupied it for a time by a tenant, he could not thereafter discontinue the occupation during the subsequent life of the policy, and leave the premises vacant, without forfeiting the insurance. The policy contains these among other, conditions: "If the dwelling house or houses hereby

insured shall cease to be occupied by the owner or occupant in the usual and ordinary manner in which dwelling-houses are occupied as such, or be so unoccupied at the time of effecting insurance, and not so stated in the application, then, and in every such case, or in either of said events, this policy shall be null and void until the written consent of the company at the home office is obtained." The defendant bases his contention upon the first of the conditions above quoted. It is plain, we think, that this condition was intended to protect the company against an increase of risk, by leaving premises vacant which were occupied at the time the insurance was effected, and that it has no application to a risk taken on an unoccupied dwelling-house.

The cost of insurance is regulated by the hazard, and, when the company insure a vacant building, it charges an equivalent for its undertaking, and, if the contract contains no provision limiting the vacancy, it may continue during the whole time of the policy, and the premium presumably covers the risk. The condition in question imposes no obligation upon the owner of a dwelling-house, insured as vacant property, to occupy it for any period during the running of the policy; and it must be conceded that if the plaintiff had permitted the house to remain vacant during the whole time after the policy was issued, to the fire, there would have been no defense founded upon the condition in question. The claim is that the plaintiff, having voluntarily put a tenant in possession, although he was not bound to do so, could not thereafter terminate the tenancy without forfeiting the insurance. We think this construction of the condition is not admissible. The conditions which precede the one in question relate to acts or conditions occurring subsequent to the contract, which change the risk and increase the hazard. The condition in question is of the same character. It does not permit the owner of a dwelling-house, insured as an occupied house, to increase the hazard by allowing it to become vacant without the consent of the company. If it is unoccupied when insured, the subsequent condition applies that the fact of non-occupation must be stated in the application. The fact of non-occupation was stated in the application as reformed, and was known to the agent, who should have stated it in the application as originally furnished. As between the company and the plaintiff, it must be deemed to have been stated. The question as to notice of loss was properly decided.

We think the judgment is right, and it should therefore be affirmed. All concur.

SUPREME COURT OF PENNSYLVANIA.

Error to Common Pleas, No. 2, Allegheny County.

METROPOLITAN LIFE INS. CO. OF NEW YORK

vs.

JENKINS, ADM'R.*

The Pennsylvania act of May 11, 1881, provides that, to constitute the application for life insurance a part of the policy, the policy must contain the application as signed, or a copy thereof, or have such copy attached to it. *Held*, That an affidavit of defense to an action on such a policy, which set up false answers in the application as a defense, but which failed to set out that the policy embraced such a copy of the application, or had it attached, was fatally defective, and that judgment should be entered against the defendant as for want of a sufficient affidavit of defense.

Action by Reuben Jenkins, defendant in error, as administrator of Isaac Jenkins, on two policies of life insurance, viz., Nos. 1,097,983 and 1,973,466, issued by the defendant company, plaintiff in error. The affidavit of claim was to the effect that no copies of the applications had been attached to the respective policies prior to the death of the assured, as required by the act of May 11, 1881. That act is as follows: "All life and fire insurance policies upon the lives or property of persons within this commonwealth, whether issued by companies organized under the laws of this State, or by foreign companies doing business therein, which contain any reference to the application of the insured, or the constitution, by-laws, or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain or have attached to said policies correct

* Decision rendered, November 15, 1886.—From *Atlantic Reporter*.

copies of the application, as signed by the applicant, and the by-laws referred to; and unless so attached and accompanying the policy, no such application, constitution, or by-laws shall be received in evidence in any controversy between the parties to or interested in the said policy, nor shall such application or by-laws be considered a part of the policy or contract between such parties."

The defendant filed the following affidavit of defense: "(1) By the terms of the policies in suit, the representations and agreements in the printed and written applications for the policies are made part of the contract; and it is provided that if said representations be not true, or unless at the time of the delivery of the policies the proposed insured should be alive and in sound health, * * * the policies shall be void. Deponent is informed and believes that in his answers to questions 18, 21, and 22 the applicant did not tell the truth; that, in point of fact, the proposed insured had met with an accident resulting in strangulated inguinal hernia (which finally caused his death) prior to the date of answering said questions in both the applications, and, at the date of the delivery of both the policies sued on, the insured was not in sound health. This the deponent expects to be able to prove on the trial of the cause. (2) Deponent denies that the proofs of death were satisfactory to said company, and avers that the company refused to pay for the reasons set out above; and he demands the production at the trial of the proofs, and all other papers necessary to make out plaintiff's case."

There was also a supplemental affidavit of defense to the following effect: "(1) That the plaintiff has not attached to his affidavit the applications referred to in the policies filed, or copies thereof, which deponent is advised it is his duty, under the law, to furnish. (2) Deponent is advised that the plaintiff cannot maintain this action, for the reason that policy No. 1,097,983 is made out for the benefit of John Thomas, and policy No. 1,973,466 for the benefit of Reuben Jenkins, and that said John Thomas and Reuben Jenkins are the persons designated in the policies as the ones to whom payment is to be made in case of satisfactory proof of the death of the assured and compliance with the conditions of the policies. (3) The policies in suit provide that the representations and agreements respecting the person assured, contained in the written and printed applications for said policies, are made part of the contract of insurance; and it is further provided that if the said representations be not true, or if the insured should not be alive and in sound health at the

time of the delivery of the policies, the policies shall thereupon become void. Deponent is informed and believes, and expects to be able to prove, on the trial of the cause in court, that the representations made in said application in response to questions 18, 21, and 22 are not true; that the insured was ruptured at the time, and had been prior to the date of the application."

A rule was laid upon the defendant to show cause why judgment should not be entered for want of a sufficient affidavit of defense, whereupon the following judgment was entered: "And now, March 30, 1886, on argument list, and plaintiff having modified his rule so as to ask for judgment for the amount insured in policy No. 1,097,983, the rule for judgment as to the amount claimed in said policy No. 1,097,983 is made absolute, with leave to plaintiff to proceed to trial on the other part of his claim." The defendant thereupon took this writ.

W. K. JENNINGS, *for Plaintiff in Error.*

YOST & REDMAN, *for Defendant in Error.*

PER CURIAM.

The affidavit of defense was clearly defective, in that it did not allege that the applications, to which it referred, were attached to the policies. The main defense would seem, from the affidavit, to rest on these applications, but, under the act of May 11, 1881, they not being so attached, could not be made available to defeat the plaintiff's action. What the effect may be of taking judgment for part of the claim must be left for consideration when the plaintiff seeks to obtain judgment for the balance of it.

The judgment is affirmed.

SUPREME COURT OF PENNSYLVANIA.

Error to Common Pleas, Centre County.

LEBANON MUT. INS. CO. }

vs. }

LEATHERS AND ANOTHER.* }

The clause in a policy of fire insurance that, if the premises "shall cease to be operated without the consent of the company indorsed hereon, this policy shall cease and determine," is not violated by a mere temporary suspension of the business of the establishment for the purpose of repairing, or from want of a supply of materials.

A policy of fire insurance contained a clause that, if the assured should mortgage the property without notice to the company, the policy should be null and void. After the issuing of the policy, the insured mortgaged the property without notice to the company, and subsequently the insured paid the premium, and renewed the policy for another year, within which time the property was destroyed by fire, and an action was brought upon the policy and renewal. *Held*, that there was no mortgage executed contrary to the renewed policy.

Covenant by B. F. Leathers and A. T. Leathers, trading as B. F. Leathers & Son, against the Lebanon Mutual Insurance Company.

B. F. Leathers & Son owned and operated a steam tannery in Unionville, Centre County, Pennsylvania. On the thirtieth day of November, 1881, the Lebanon Mutual Insurance Company issued a policy of insurance on this tannery in the sum of \$1,000; the insurance to be in force for one year from 12 o'clock noon, November 30, 1881, to 12 o'clock noon, November 30, 1882. On the twenty-eighth of November, 1882, on application of B. F. Leathers & Son, a renewal certificate was issued by the company, continuing the policy in force another year, from 12 o'clock noon, November 30, 1882.

* Decision rendered, February 23, 1887.—From *Atlantic Reporter*.

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On the twelfth or thirteenth of November, 1883, the tannery was burned. In the second paragraph of the fifth condition of the policy it was provided as follows, among other things, viz.: If the assured "shall sell or transfer the property herein insured, or mortgage the same, without notice to this company indorsed thereon, * * * then and in every such case this policy shall be null and void." The sixth paragraph of condition 7 provided as follows: "This policy will not cover unoccupied buildings, unless insured as such; and if the the premises insured shall be vacated without the consent of this company indorsed hereon, or if the property insured be a manufacturing establishment or mill running in whole or in part over or extra time, or running at night, or if the same shall cease to be operated without the consent of the company indorsed thereon, this policy shall cease and determine." B. F. Leathers & Son, on the sixteenth day of February, 1882, mortgaged the insured premises to Christian Buck, to secure the payment of \$1,180, which mortgage remained unsatisfied and the debt unpaid at the time of the fire, and at the time of the trial in the court below. Another mortgage on these and other premises was executed and delivered by the said parties on third day of March, 1882, to Massey and Janney, to secure the payment of \$5,000, which was satisfied before the fire. No notice of either of these mortgages was given to the company. During part of the summer of 1883, and some time prior to the fire, defendants in error did not do any tanning in the shops connected with the property insured because they had run out of hides. They negotiated with a number of persons for hides and stocks; had ordered hides, but the orders were not yet filled when the fire occurred. The property, however, during all this time, was occupied and used as a tannery. Bark was purchased, prepared, and placed into the sheds, in addition to the bark that remained over from the previous year. The liquors were kept in the vats ready for use whenever hides could be secured. The machinery and tools all remained on the premises, and at no time during the life of the policy was the property vacant, nor did it cease to be kept and operated as a tannery. Verdict and judgment for plaintiffs, \$1,123.98, whereupon defendant took this writ.

ADAM HOY, for Plaintiff in Error.

There was a violation of the clause relating to the occupancy of the premise: Wood, Fire Ins., § 81, p. 164; id., 181, 182; Keith vs. Quincy Co., 10 Allen., 228.

ORVIS, BOWERS & ORVIS, *for Defendants in Error.*

If there is any obscurity in a policy, it must be construed most strongly against the company: *Grandin vs. Insurance Co.*, 15 Wkly. Notes Cas., 1. The question whether the suspension of business was only temporary was submitted to the jury, and they found that it was temporary. This was proper: *Lebanon Mut. Ins. Co. vs. Erb*, 112 Pa. St., 149, 4 Atl. Rep., 8.

PER CURIAM.

A mere temporary suspension of the business of the establishment for the purpose of repairing, or from want of a supply of materials, is clearly not ceasing to operate the establishment within the meaning of the policy. No mortgage on the property insured is shown to have been executed contrary to the provisions of the renewed policy on which the claim for this loss is made. It does not appear that a copy of the application was attached to the policy so as to make it admissible in evidence under section 1 of the act of May 11, 1881 (Purd. Dig., 924, pl. 108). Judgment affirmed.

SUPREME COURT OF IOWA.

QUINN

vs.

CAPITAL INS. CO.*)

Where the statutes forbid suit to be begun on a policy within 90 days after notice of loss has been given, refusal of the company to pay and notice that it will stand suit will not enable a claimant to sue until the expiration of the statutory time.

CONRAD & CAMPBELL, *for Appellant.*

FRANK ALLYN, *for Appellee.*

SEEVERS, J.

Counsel for the appellant insists that the judgment of the circuit court should be reversed on three grounds. It seems to us that the special findings of the jury preclude us from considering the first two grounds, and the third is that the action was prematurely brought. This ground is based upon the statute which declares that no action on a policy of insurance "shall be begun within ninety days after notice of the loss has been given." Laws 1880, c 211; Millers Code 1880, p. 299. It is conceded this action was commenced before the expiration of 90 days after the notice of the loss was given. The court instructed the jury as follows: "There is a provision of the statute prohibiting suits of this kind until ninety days after the proof of loss; and in the absence of any excuse for so doing, a suit cannot be maintained within that time; but if a company has absolutely refused to pay a loss, and informs a policy-holder, or its representatives, that it will stand a suit, and will not pay, or the like, then the law does not require a needless delay, and the policy-holder may at

Decision rendered, June 8, 1887.

once sue if it is perfectly clear the company does not intend to pay, and proposes to contest."

It will be observed that the statute is clear and explicit, and contains no exception whatever, and yet the instruction ingrafts on or injects into it a very important exception or qualification; and, in so doing, we think the court erred. In a statutory sense, the money was not due on the policy until the expiration of the period named therein. The holder of the policy could not lawfully demand payment until that time had elapsed after the notice had been given. If the maker of promissory note not due should positively declare and state that he would not pay it when due, this would not authorize the holder to bring an action on it prior to the maturity of the note. The same rule must prevail in the present case. The defendant might conclude to pay, but whether it did or not is immaterial, for the reason that the loss was not due and payable to the plaintiff until the expiration of 90 days after the notice of the loss was given and therefore the court erred in giving the foregoing instruction. Reversed.

SUPREME COURT OF MINNESOTA.

LAUDENSCHLAGER

vs.

NORTHWESTERN ENDOWMENT AND LEGACY
ASS'N OF MINNESOTA.*

A contract of insurance, made by a husband, provided the money should be "payable, in case of his death, to his wife, M. L., or her executors, administrators, guardians, or assigns, as directed by said member in his application, or to such other person or persons as he may subsequently direct, by will or otherwise." *Held*, That in an action on this contract by the wife, she need not allege in her complaint that the husband had not directed the money to be paid to any other person, as that is matter of defense.

LIND & HAGBERG, for Laudenschlager.

HOYT & MICHAEL, for Northwestern Endowment and Legacy Association.

GILFILLAN, C. J.

The contract of insurance on which this action is brought, made by Henry Laudenschlager with the defendant, provides that the sum to be paid at his death shall be "payable, in case of his death, to his wife, Minnie Laundenschlager, or her executors, administrators, guardians, or assigns, as directed by said member in his application, or to such other person or persons as he may subsequently direct, by will or otherwise." The power reserved in the insured to "subsequently direct, by will or otherwise," the person to whom the money should be paid, of course qualified the rights of the wife in the contract. It made her interest a mere expectancy, while the power to revoke her appointment as beneficiary of the contract con-

* Decision rendered, December 6, 1886.

tinned: *Richmond vs. Johnson*, 28 Minn., 447; s. c., 10 N. W. Rep., 596. But it was an expectancy that would become an absolute right upon the death of the husband, unless he had, by will or otherwise, defeated it by the affirmative act of appointing some other beneficiary. That it was defeated—that the appointment of her was revoked—must necessarily be matter of defense. It was not necessary, therefore, for plaintiff, in her complaint, to negative the facts.

Order affirmed.

FOREIGN CASE.

WAIVER OF OTHER INSURANCE.

Supreme Court of Dominion of Canada.

WESTERN ASSURANCE CO.

vs.

DOULL.*

A condition of the policy required that notice of other insurance should be given to the company, and indorsed on the policy or otherwise acknowledged in writing.

Held, That the notice must be given to the company itself through its managing officers at its head office, notice to a local agent though given in writing where no indorsement had been made upon the policy was not sufficient.

Held, That the fact of the other insurance having been effected through the same agent, would not amount to constructive knowledge by the company or a waiver of the condition where actual knowledge had not been brought to the company.

Held, That an average-adjuster, employed to adjust the loss had no power to waive a breach of the policy-provision regarding other insurance.

Held, That a mere investigation by such adjuster regarding the amount of loss and consequent liability without more, would not amount to a waiver of the condition, even had he been authorized to waive such condition.

HENRY & WESTON, *Solicitors for Appellants.*

THOMAS RITCHIE, *Solicitor for Respondents.*

STRONG, J.

The policy sued upon contains a reference to the conditions which are expressed in the following terms:—

* Decision rendered, April, 1886.

This policy is made and accepted in reference to the conditions herein contained and hereto annexed, which are hereby declared to be part of this contract, and to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein or otherwise specially provided for.

The sixth condition annexed to the policy is as follows :—

Notices of all previous assurances upon property assured by this company shall be given to them, and indorsed on this policy, or otherwise acknowledged by this company in writing, at or before the time of their making assurance thereon, otherwise the policy subscribed by this company shall cease and be of no effect. And in case of subsequent assurance on any interest in property assured by this company (whether the interest assured be the same as that assured by this company or not), notice thereof must also be given in writing at once, and such subsequent assurance indorsed on the policy granted by this company, or otherwise acknowledged in writing in default whereof, such policy shall thenceforth cease and be of no effect. And in all cases of further assurance, this company shall be liable only for such ratable proportion of the loss or damage happening to the object assured, as the amount assured by this company shall bear to the whole amount assured thereon, without reference to the dates of the different policies; and any general policy on different properties to be treated as a specific policy on each property for the whole amount thereby assured.

It is alleged in the declaration that, except as hereinafter mentioned, all conditions were fulfilled, and all things happened and all times elapsed necessary to entitle the plaintiffs to maintain this action.

Further, the declaration contains the following averment with reference to the sixth condition :—

And as to the sixth condition contained in said policy, whereby it was provided that in case of subsequent assurance on any interest in property assured by defendant company notice thereof must be given in writing at once and such subsequent assurance indorsed on the policy granted by the company or otherwise acknowledged in writing. Plaintiffs say that shortly after subsequent assurance was effected on said property and before said loss-notice thereof was given verbally and in writing to the agent of defendant company, who accepted the same as a sufficient compliance with said condition on the part of the plaintiffs, it being the duty of the defendant company or its agent to indorse such subsequent assurance on the policy or otherwise to acknowledge it in writing, and which said company or its agent neglected to do.

The fifth plea is as follows :—

And for a fifth plea to said amended declaration defendants say that no notice of any subsequent insurance was given to their agent, nor was such notice accepted as sufficient compliance with said sixth condition as alleged, nor was it the duty of defendants to indorse such subsequent insurance on said

policy, or otherwise to acknowledge it in writing, nor did defendants or their agent neglect so to do as alleged.

To this fifth plea the plaintiffs replied, taking issue, and also as follows :—

As to the fifth plea that all subsequent insurances were known to defendants, and defendants accepted such knowledge as a sufficient compliance with sixth condition, and relieved plaintiffs from further compliance with condition.

Upon this replication issue was taken.

Pending this action the "Nova Scotia Judicature Act, 1884," was passed by the provincial legislature, and by the tenth section of that act it was made applicable to proceedings in actions pending, and which had not reached the stage of final judgment prior to the first of October, 1884. This action came on for trial on the 8th of November, 1884, consequently all equitable as well as legal questions which were sufficiently raised by the pleadings were open to the parties and the court was bound pursuant to the twelfth section of the act in question to administer equitable as well as legal relief in determining the issues raised upon the record. The allegation as to compliance with the sixth condition contained in the declaration, and which has been already stated, is clearly insufficient to show performance of this condition. The condition requires that notice shall be given to the company; it is not alleged nor is it proved that it was within the authority of the local agent to receive such a notice, and decided cases have determined that a condition of this kind requires that notice should be given to the company directly through its managing officers at its head office: *Gale vs. Lewis*, 9 Q. B., 730; *Mason vs. Hartford*, 37 U. C. Q. B., 437.

Moreover, the terms of the condition show that beyond giving notice the subsequent assurance must be indorsed on the policy or acknowledged in writing "in default whereof such policy shall thenceforth cease and be of no effect."

It is neither pleaded or proved that any notice was given to the company in the manner required nor that the subsequent policy was indorsed or otherwise acknowledged in writing, which by the express stipulations of the policy was to be the only evidence of the appellant's consent to continue the risk after a subsequent policy had been effected: *Noad vs. Provincial Ins. Co.*, 18 Upper Canada, Q. B., 584; *Chapman vs. Lancashire Ins. Co.*, 13 L. C. Jur., 36.

The question as to the sufficiency of the respondents' answer to the defense raised upon this sixth condition is therefore reduced to

one of waiver. It is not shown that it was within the scope of Greer's authority as a local agent to waive such a condition. The condition itself does not, either by express words or by implication, recognize such an authority, but the reason for requiring the notice obviously points to a directly contrary construction. Moreover, the English case already quoted which determines that the required notice is to be given to the company itself and not to the local agent, shows a fortiori that such an agent has in the absence of express authority no power to waive the condition. Direct authority is, however, not wanting. In the case of *Shannon vs. Gore District Mutual Ins. Co.* (2 Ont. App. C., 396) the facts were the same as in the present case, the subsequent insurance having been effected through the agent who also acted for the defendant in taking the original risk. It was contended that the successive insurances having been thus effected with the same person as the agent of the two companies, the company which granted the first policy had knowledge of the subsequent insurance and were therefore estopped from setting up a condition vitiating their policy for want of written notice. But the court of appeals held otherwise, and determined that in such a case notice to the agent was not notice to the company, and that the agent neither had the authority to waive the condition nor could by his conduct estop his principals, the first insurers.

As regards any direct action of the appellants through their immediate agents, the directors or principal officers of the company controlling its affairs at the head office, there is no pretense for saying that there is in the present case the slightest evidence of conduct upon which either a defense of waiver of the condition or by way of estoppel against insisting upon it, can be based, and this for the very plain reason that these directors and officers never had the fact of a subsequent assurance brought to their knowledge and without proof of such knowledge neither waiver nor estoppel can of course be made out.

If, therefore, the appellants have in any way disentitled themselves to set up the defense they insist upon, founded upon the sixth condition, it can only be in consequence of what was done or agreed to by Mr. Cory the adjuster, employed to ascertain the circumstances attending the loss, and the amount for which the appellants were liable.

The observations already made with reference to a waiver by the company that it could not be said to have waived an objection to its

liability, founded on a fact of which it had no knowledge, is also applicable to any contention of this kind founded on the mere fact of the appointment of Cory as an agent to ascertain the circumstances of the loss and a reference to him to adjust the proportion which the appellants were liable for. It is manifest that upon the facts in evidence no waiver can be implied from such an appointment and delegation. If, then, there was any waiver or estoppel binding the appellants, it can only be by reason of the acts of Cory within the scope of his authority. Cory was an average-adjuster living at St. John and came to Halifax for the special purpose of investigating this loss and ascertaining the shares which the several companies whose policies covered the goods were bound to contribute. It does not appear very clearly whether he was instructed directly from the principal office of the appellants or through Greer. The latter in his evidence says he "had a telegram from the defendant company authorizing me to request Cory to adjust the loss, and I requested him to do so." In cross-examination he says, "after a loss I notify the head office and I get instructions from them what to do. Generally they instruct Cory or Dodd to adjust for them. I do not remember getting a telegram authorizing me to get Cory." Cory himself does not state from whom he derived his instructions, nor what they precisely were.

I think, however, we may assume, and this is putting it perhaps more strongly against the appellants than the evidence warrants, that Cory was employed either directly by the appellant's managing officers or through Greer in pursuance of express instructions from the head office, and that consequently whatever he did within the scope of his authority bound the appellants. Then what were his powers? We have no direct evidence of this. All that appears is that he was authorized to investigate and adjust the loss. By this I understand that it was his duty to ascertain the circumstances and amount of the loss, and either with or without the concert of the adjusters or the other insurers to ascertain the proportion of it for which the defendants were liable. It is manifest that this involved no actual authority to waive a condition by a breach of which the policy had been avoided long before the loss, and of which breach the appellants themselves, when they conferred authority on Cory to act for them, had no knowledge. Neither did it imply any such authority.

As regards proofs of loss I should have no difficulty in holding that Cory had authority to waive them; for, as the first step to be

taken by him in investigating the loss would have been to call for the proofs, he must have had by implication power to dispense with such proofs or to accept such proofs short of those actually required by the conditions as might seem to him sufficient. But as regards breaches of conditions which had vitiated the policy long before the loss that he could have had no more power to waive than he had to waive a defense extra the terms and conditions of the policy altogether, such as fraud in the inception of the contract or want of interest invalidating the policy *ab initio*.

In the case of *Mason vs. Hartford Ins. Co.* (37 U. C. Q. B. 437), the court had to deal with this identical question, and they held that an agent with much wider authority than Cory had in the present case, viz. : express authority to examine into the circumstances of the loss adjusted and to settle it or to report to the office, had no authority to waive the condition respecting subsequent assurance in all respects similar to that now in question. The court, by Wilson J., say:—

It was said at the trial the duties of the inspector are to examine into the circumstances, to adjust the loss, and to settle or report to the office. The description of the position which Mr. Mann, the inspector of the defendants, filled in their service, and of the duties that devolve upon him and of the powers exercisable by him as such officer, does not necessarily give him the right to waive conditions favorable to the company unless the waiver relate distinctly to some matter in and over which he can exercise such power. It is said the inspector is to adjust the loss, that is, to examine the books of accounts and vouchers, and to make all the inquiries of the insured and his employees as to the value of the goods insured which have been destroyed or injured, to determine probably whether the goods claimed for come within the description of those insured, the extent of the loss sustained, how much is total and how much is partial, the value to be set on the different kinds of loss, and generally to do all such acts as will enable him to arrive at a fair estimate of the damage sustained. Now, suppose there was a condition on the policy that in adjusting the loss the insured should deliver to the inspector or agent of the company engaged in the adjustment an account or statement in writing of the various matters which the inspector should require him to furnish, and if he did not do so that the policy should be void, I should say without hesitation that if an adjustment were made by an agent without a statement in writing such as the condition required being furnished by the insured, and without the agent requiring any such statement because he was willing and content to do without it, that the adjustment so made, free from fraud or collusion, would be binding on the insured because that would be an act within the line of duty and power of such an agent to deal with. But when such a person assumes to dispense with conditions relating to the keeping of prohibited or highly hazardous goods, or largely in excess of the allowable quantity, or to a misdescription of the mode of heating, or the precautions required in case of steam being used, or with respect to chimneys or stove-pipes or the de-

posit of ashes in the proximity of dangerous places and the like, a different question is certainly presented. I am not satisfied that an inspector of an insurance company or such an agent as Mann is described to be has the right or power to waive or dispense with the condition in question relating to further insurance or with any other condition than such as may fall clearly within the powers of the agent's clear and acknowledged line of duty.

Although this case was not a binding authority, either on the court below or on this court, yet the observations contained in the extract from the judgment just given so commend themselves to our consideration in the present case, alike by the force of the reasoning and by their exact applicability to the facts now before us, that they appear to me to be decisive of the question here raised as to the powers of Mr. Cory to waive this condition. It is further to be observed that the powers of the agent in the case just quoted from were much larger than those which were possessed by Cory, for in the Ontario case the agent had express power to settle the loss. But even if Cory had had authority to waive, it is plain on the evidence he never assumed to exercise it. All he did was to ascertain the circumstances attending the loss and the amount which the appellants would have had to contribute to it in case they had been liable to pay; he did not assume to waive any rights of the appellants and nothing of the kind could be implied from the investigation and valuations which he made or caused to be made. Indeed, so careful was Greer to guard against any such construction being put on what was done, that in the appointment of appraisers to value the damaged goods there was an express provision that the reference as to the values should not affect the rights of the insurers as regards the conditions of the policies, the clause being as follows:—

It being understood that this appointment is without reference to any other questions or matters of difference, if any, within the terms and conditions of the insurance, and is of binding effect only so far as regards the actual cash value of or damage to such property covered by policies of said companies as may be found to have been saved in a damaged condition and not in regard to any other matter whatever.

Nothing seems to have been done by Mr. Cory beyond making this appraisalment and making an inquiry into the circumstances of the loss, and it is impossible to imply from these acts any intention on his part to waive the rights of the appellants to insist on a forfeiture under the 6th condition, even if he had had notice, of the breach of the condition, of which there was no evidence, and had had authority to waive the defense which the company had under its terms, in respect of which also there is an entire failure of proof.

I am of opinion that the appeal should be allowed and judgment in the court below entered for the appellants with costs in both courts.

RITCHIE, C. J.

The policy in this case was issued April 22d, 1882, and contained this clause:—

This policy is made and accepted in reference to the conditions herein contained and hereto annexed, which are hereby declared to be part of this contract, and to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein or otherwise specially provided for.

And this condition:—

Notices of all previous assurances upon property assured by this company shall be given to them, and indorsed on this policy, or otherwise acknowledged by this company in writing. at or before the time of making their assurance thereon, otherwise the policy subscribed by this company shall cease and be of no effect. And in case of subsequent assurance on any interest on property assured by this company (whether the interest assured be the same as that assured by this company or not) notice thereof must also be given in writing at once, and such subsequent assurance indorsed on the policy granted by this company, or otherwise acknowledged in writing; in default whereof, such policy shall thenceforth cease and be of no effect.

And in all cases or further assurance, this company shall be liable only for such ratable proportion of the loss or damage happening to the object assured, as the amount assured by this company shall bear to the whole amount assured thereon, without reference to the dates of the different policies; and any general policy on different properties to be treated as a specific policy on each property for the whole amount thereby assured.

On the 28th of May, 1883, a further insurance of \$4,000 in the British American Insurance Company was put on the property by Gibson in addition to the amount insured by the policy in suit, and which was admitted to be in force.

This subsequent insurance was not at once notified to the company in writing, nor was it indorsed on the policy in suit, granted by the company or otherwise acknowledged in writing, in default whereof the policy thenceforth ceased and became of no effect.

The respondents contend that the appellants waived this condition, and are estopped from setting it up. It is not, and cannot be, contended that the company, with knowledge of this further insurance, waived the condition in respect to it; for previous to the loss it does not appear to have been called to their notice, in fact, the head office had neither notice, verbal or written, nor actual cognizance of such further insurance.

But it is contended that the condition was waived by their agent or inspector, or both, neither of whom, however, in my opinion, had any authority to dispense with the performance of this condition, if they really attempted or intended to do so, which is more than doubtful.

HENRY, J.

I think, also, that this appeal should be allowed. The condition in the policy is one which must be complied with or waived. The company, by signing a condition of that kind, reserves to itself the right to withdraw the policy in case of further insurance. That question is one which cannot be decided by a mere local agent. He may receive the notice for transmission, but he cannot act upon it; it must be brought to the notice of some person authorized by the company to continue the insurance after notice has been given them. It has been decided in a number of cases in England that a local agent has not such authority, and a mere notice to him, even in a case where he is acting for another company taking the further risk, has been held to be no notice to the company. But independent of all that, the condition requires that the consent should be signed on the back of the policy. So that, even if the company had consented verbally, and had not so signified its consent, it would not have been a compliance with the condition. I think we must come to the conclusion that the agent had not power to waive the condition, and did not waive it.

STRONG, J.

I am of opinion that the judgment of the court below should be reversed, and judgment entered for the appellants with costs in both courts. Fournier, J., concurred.

GWYNNE, J.

I am also of opinion that the appeal should be allowed.
Appeal allowed with costs.

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ACCIDENT.

1. **TOTAL DISABILITY.**—Where a party claims compensation from an accident insurance company for a period during which he was unable to work in consequence of an accident, and the policy expressly provides for compensation for the period of continuous total disability only, an instruction to the jury that by total disability was meant inability to do substantially all kinds of his accustomed labor to some extent, is erroneous. *Sareland vs. Fidelity & Casualty Co.*, 212.
2. **CERTIFICATE OF BENEVOLENT SOCIETY—WHAT CONSTITUTES.**—The certificate in a benevolent association is a contract, and in case of accident the injury must be proved to be within its conditions in order to recover.
The certificate provided that no claim should be made for any injury while engaged in or in consequence of any criminal act. The defense was that the plaintiff was injured in a public highway while in a state of intoxication, which is a criminal act under the statute of Indiana.
Held, That the defense was bad on demurrer because it showed no causative connection between his condition and the injury. *National Benefit Association vs. Bowman*, 504.
3. **DEATH OF EMPLOYE ON RAILROAD—EVIDENCE OF NEGLIGENCE.**—In an action upon an insurance policy in which the company insures against bodily injuries "effected through external, violent, and accidental means," the policy containing provisos that the insurance "shall not extend to any bodily injuries * * * where the death or injury may have happened in consequence of violent exposure to unnecessary danger, hazard, or perilous adventure," and that the policy is subject to the condition that "the party insured is required to use all due diligence for personal safety and protection," etc., **held,** that an employe of a railroad company who, while on the railroad-track, was killed by a train, received bodily injuries through "external, violent, and accidental means," and that he did not expose himself to unnecessary danger by being upon the track, he having been sent there to shovel snow from the crossings, and that the burden of

proof was upon the company to show that the insured did not use "all due diligence for personal safety and protection."

In an action upon a policy of insurance, it appeared that the insured was killed by being run over by a railroad-train, and the question raised was whether his death resulted from his own fault, or through that of the managers of the train. *Held*, upon the engineer of the train having given testimony tending to show that he saw the deceased on the track as soon as he could be seen from the engine, and that the train was stopped as soon as possible, that it was competent for the conductor of the train to testify, for the purpose of rebutting the testimony of the engineer, that the train might have been stopped sooner than it was, and that it could not be said that the conductor had not sufficient experience to justify the court in allowing him to so testify, although it did not appear that he had any particular knowledge as to the running of an engine. *Freeman vs. Travelers' Ins. Co.*, 822.

4. DEATH FROM DESIGN DURING UNLAWFUL ACT.—The insured under an accident policy was a deserter from the army, and an officer instructed to arrest him shot and killed him upon the insured appearing at the door of a house where he was stopping. The evidence was conflicting whether the officer knew that the man he shot was the party for whom he was searching, and whether the shooting was done in self-defense, because threatened with a pistol. The policy provided that death must be proved to be due to external violence and accidental means, and not the result of design, either on the part of the insured or any other person.

Held, That if the officer did not know that the insured was the party he fired at and did not intend to kill him, it could not be claimed as a matter of law that the death was the result of design within the policy.

Held, That it cannot be claimed as a matter of law that the insured was doing an unlawful act at the time of the killing; the question is one for the jury. *Utter vs. Travelers' Ins. Co.*, 532.

5. DEATH IN BATH FROM EPILEPSY.—Where the evidence showed death in a bath as the result of epilepsy, and that abrasions were received in falling, but the bruises were not sufficient to cause death, the death resulted from other causes than external, violent, and accidental means within the intent of an accident policy. *Tenant vs. Travelers' Ins. Co.*, 476.

See PREMIUMS 2; SUICIDE 1, 2; UNAUTHORIZED COMPANY.

ACTION.

1. IN CASE OF MORTGAGEE.—The plaintiff obtained from the defendant an insurance policy upon a house and machinery therein, which contained a provision that the loss or damage on the machinery should be payable to a third person, who was mortgagee. Under Code Iowa, § 2,544, the plaintiff had a right to prosecute the action for the whole amount of the loss in his own name; and under section 2,683 the mortgagee had a right, as intervenor, to become a party to the action.—*Stevens vs. Citizens' Ins. Co.*, 112.

2. EVIDENCE OF AGENT—EVIDENCE OF VALUATION—KNOWLEDGE OF MORTGAGE—AGENT'S AUTHORITY.—The admission of the statements in evidence of a soliciting agent, proved to be an officer and stockholder of the company, if error at all, is error without prejudice.

A witness may testify as to the value of goods destroyed, designated by certain terms, if he is familiar with the designation, without the objection of his being called on to construe the policy, or to determine what goods are covered by the description.

Where a defense is pleaded in answer to a complaint, and the issue thereon is fairly and fully presented in an instruction, it is as well presented in that connection as though it had been found in the statement of the pleadings and issues preceding the instructions.

If there is no controversy at the trial as to the value of the property, and the plaintiff testifies that she paid a certain sum for it, and its value is stated at that sum in the application for insurance, in the absence of any evidence or claims to the contrary, the jury may find its value in that sum.

Where the company pleads the existence of a mortgage, and the plaintiff replies that when the insurance was effected she fully explained it, and further replies that any breaches of the condition of the policy which may have occurred were waived by the act of the assistant secretary of the company, in requiring and taking proof of loss, which he pronounces sufficient, at the same time informing plaintiff that the loss would be paid, she is entitled to recover in the action.

The court need not instruct the jury as to agent's authority to do certain acts on which a claim of waiver is based, where the reply of plaintiff pleads a waiver, which is not denied. Knowledge of agent is chargeable to company. *Siltz vs. Hawkeye Ins. Co.*, 106.

3. **WHEN PREMATURE.**—A policy of fire insurance which permitted concurrent insurance provided that, in case of loss, immediate notice should be given the company, and as soon thereafter as possible, proof thereof, under oath, setting forth, inter alia, the amount of other insurance, the actual value of the property burned, and containing a plan and specification of the building. The insured, by the terms of the policy, was entitled to recover no greater proportion of the loss than the amount of the policy should bear to the whole amount of insurance. The loss was to be paid sixty days after due notice and proofs of the same were given the company, unless the property be replaced, or the company give notice of its intention to rebuild or repair the damaged premises. The building covered by the policy was totally destroyed by fire, and notice was immediately given the company. More than two months after the fire the secretary of the company requested from the insured more specific proofs of loss, and about a month thereafter these were furnished, but without plans or specifications. Suit was brought on the policy twenty days after the proofs were furnished. *Held*, That under the conditions of the policy, the company was entitled to the full proofs as a prerequisite of payment, and that, as the company had sixty days after the proofs were furnished to pay or rebuild, the suit was prematurely brought. *German-American Ins. Co. vs. Hocking*, 546.

4. **JOINDER OF BENEFICIARIES.**—Where a policy of insurance provides for the payment of different sums to different parties, it is improper for the beneficiaries to join in one action to recover the several sums due.

Where, however, all the beneficiaries have joined, and a demurrer to the petition has been sustained, it may be ordered that each plaintiff file his separate petition upon his cause of action, and that the defendants be ruled to answer without further service of process. *Keary vs. Mutual Reserve Fund Life Ass'n*, 606.

See **ARBITRATION** 3, 5; **ASSIGNMENT** 7; **BENEVOLENT SOCIETY** 7, 15; **LIMITATION**; **PLEADING**; **TITLE**.

ADJUSTER.

WAIVER OF PROOFS.—Where an adjuster estimates the amount of loss, prepares a written statement in the nature of an examination for claimant to sign, and assures her that there is nothing more to do, this is a waiver of proof of loss, where the policy provides that insured shall at request submit to an examination.

An adjuster authorized to make such an examination has power to waive further proofs thereafter, even when the policy provides that agents have no power to waive its conditions without written indorsement thereon. *Indiana Ins. Co. vs. Capehart*, 53.

See **OTHER INSURANCE** 1; **NOTICE**.

ADMINISTRATOR.

RELIEF AGAINST FRAUDULENT JUDGMENT.—In 1870 suit was brought by "A," as administrator, on a policy of life insurance. In the same year an alleged will of the decedent was proved, letters granted to "B" and those to "A" revoked. In 1881 "B" sued on the same policy. This action was tried on its merits and judgment in favor of the defendant entered in 1875. A writ of error was taken to the judgment and non-prossed by the supreme court in 1876. Pending this suit "B" was removed from his office as executor by decree of the orphans' court in 1873, and letters of administration c. t. a., d. b. n. granted to "A," who, however, was not substituted on the record. All the files of the case have disappeared. In 1885 the register of wills, upon proceedings before him, vacated the probate of 1870, and declared the will a forgery. "A" then took a rule upon the defendant to plead in the original suit brought by him in 1870. The defendant then filed a discontinuance of the suit and release of the cause of action executed by the plaintiff under seal in 1881. On petition by "A" for a rule to show cause why this discontinuance should not be stricken off, setting forth that he had no recollection of signing such a paper, and that if he did execute it it must have been when he was intoxicated.—*Held*.

That "A" must still be regarded as the administrator of the decedent.

That under all the circumstances the rule must be denied, without prejudice, however, to the right of the plaintiff to proceed by bill in equity. *Brockway vs. Aetna Life Ins. Co.*, 316.

See WIFE'S POLICY 1.

ADVANCEMENT. See SUBROGATION.

AGENT.

1. **LIABILITY ON BOND OF.**—The bond of an agent's surety is to be strictly construed to limit his liability within the precise words of the agreement. The declaration averred the advancement of moneys to the agents for commissions, expenses, etc.

Held, That where the contract with the agents did not stipulate for such advances, the sureties on the bond given for the faithful performance of the contract, cannot be held liable for their repayment. *Burlington Ins. Co. vs. Johnson*, 778.

2. **AUTHORITY OF CLERK AS TO OTHER INSURANCE AND PREMIUM.**—Where, under direction of the agent, a clerk of the latter solicits the application, and the agent issues a policy thereon, and a statute provides that any person soliciting insurance or procuring applications shall be held to be the agent of the company, the latter is bound by a knowledge of other insurance, communicated to the clerk by the insured, though not communicated to the company.

Evidence of a right on the part of the clerk to apply the premium to his personal indebtedness to the insured, is evidence of his right to collect it.

Where the insured in case of such other insurance was in doubt from which company she could recover, she had a right to claim from both if done in good faith. *Bennett vs. Council Bluffs Ins. Co.*, 774.

3. **WHAT CONSTITUTES—WAIVER OF PREMIUM.**—B negotiated for a policy of fire insurance with D, a general insurance agent at Phillipsburg, Penn., who forwarded the application and survey to E, an insurance broker at Boston, Mass., who sent them to the office of the insuring company at Jonestown, Penn., which company executed and forwarded to E a policy containing an acknowledgment of the receipt of the cash premium, which policy was delivered by E to B upon receipt of the premium; seventy days later the premises were destroyed by fire; up to that time E had not paid to the company the premium as received by him; the insuring company could

not defend against a recovery upon the policy on the ground that B had failed to comply with a condition of it, which condition required him to pay the premium, otherwise the policy to be void. As notwithstanding neither D nor E were the general agents of the insuring company, yet as the policy was placed in the hands of E for the purpose of delivery, an agency was implied from the nature of the transaction. *Lebanon Mutual Ins. Co. vs Erb*, 47.

4. OF COMPANY OR INSURED.—*Held*, That where a policy is deposited by insured with the agent for safe-keeping, the latter becomes his agent in any matter relating to the safe-keeping, such as misstatements regarding the contents of the document made by the agent while in his possession. *Harrison vs. Hartford F. Ins. Co.*, 787.
5. KNOWLEDGE OF INCUMBRANCE—PRACTICE.—Knowledge of incumbrance received by an agent at a time when he is not acting as such, if actually had in mind by the agent when he subsequently acts for his principal, will, as respects that transaction, be imputed to the principal.

The court, having submitted an issue of the fact to the jury upon evidence assumed to have been directed to that fact, and no exception having been taken, nor any suggestion made that the subject referred to in the evidence was not shown to be identical with the subject in issue, it is too late upon appeal to assign that as error on the part of the court. *Wilson vs. Minnesota Farmers' Ins. Co.*, 600.

6. WAIVER OF PREMIUM—WHEN RENEWAL CONTRACT IS COMPLETE.—Where a renewal was delivered without payment of premium; *Held*, that a custom of the agent to give credit for the premiums if ratified by the company by knowingly receiving and retaining them, is a waiver of a stipulation in the policy that it shall not be binding until payment of premium, and that no agent can waive the condition without special written authority.

Where the agent filled out the renewal at the request of insured, and at his request also retained it in the office, the receipt was virtually in the possession of the insured and the contract was binding. *Tennant vs. Travelers' Ins. Co.*, 476.

7. LIABILITY FOR MISREPRESENTATIONS.—Insurance was obtained by a soliciting agent on a hotel in course of completion and not yet occupied, which he represented to be occupied, lighted with gas, and heated with coal. The agent acted in good faith, but through a misconception of his duty. The risk was not of a kind which the company did not insure against. The company upon payment of the loss sued the agent to recover the amount so paid.

Held, That the question was simply one of rates, and the company could not recover without showing that it had been damaged in the matter of rates. *State Ins. Co. vs. Richmond*, 459.

8. DELIVERY NOT A WAIVER OF PREMIUM WHEN.—The application, which was made part of the contract, provided that under no circumstances should it be in force until the annual dues had been paid. The policy recited that "Whereas the first payment * * having first been received" etc., while attached to it was a blank form of receipt referring to the policy and application for the terms of agreement, and reciting how it must be signed to be valid and that cash or its equivalent must be given in exchange.

Held, That a delivery by the agent was not a waiver of prepayment of premium, the agent had no authority to waive such payment, and the knowledge of the fact was sufficiently brought to the attention of the applicant. *Ormond vs. Fidelity Mutual Life Ass'n*, 390.

9. WAIVER BY.—Where a policy provides that its conditions shall only be waived by the written or printed consent of the company, a local agent having authority only to receive premiums and issue policies cannot bind the company by an oral waiver of such conditions; as where the local agent was at the same time chairman of the board of selectmen of a town, and

as such issued to the insured a license for the sale of intoxicating liquors, assuring him that it would not affect the policy during its life, but that he could not let him have another at the same rates. *Kyte vs. Commercial Union Ins. Co.*, 330.

10. **LIABILITY OF COMPANY IN CASE OF DISMISSAL.**—The company's general agents, out of commissions, paid the expenses of the agency business, including compensation of subordinate agents, who were commissioned by the company, but the suggestion that they should be commissioned and their names, came from the general agents. The subordinate agents acted also for two other companies, reporting to the general agents in like manner as in respect of the business done for plaintiff company. The general agents were dismissed from the employ of the company, and the latter solicited the subordinate agents to continue in its employ. In an action against the company for injury to the business of the general agents by thus inducing the local agents to continue in the employ of the company.

Held, That if there were any property-right in the good will of the sub-agents, it had been transferred to the company, but no such property-right existed as rendered the company liable for the subsequent employment.

Held, That the sub-agents were the agents of the company under the law of the State which required their appointment as its representatives by a commission direct from the company.

Held, That the revocation of the general agency did not revoke the sub-agencies. *Fire Association vs. Law*, 375.

11. **LIABILITY FOR FAILURE TO CANCEL.**—Local insurance agents are liable for losses arising from negligent omissions on their part, in departing from instructions of their superiors in the management of the trust committed to them.

Where a local agent received instructions from a State agent of the company (whose authority included the supervision of risks taken by the local agents, and the power to order the cancellation of the same desiring him "to relieve the company" of a certain risk "as soon as possible," which the local agent failed to do, but, instead, answered by letter requesting "that the policy might run to expiration," which would occur a few days later, and stating that it would by an accommodation to him to allow it to so run, and thereafter, within four days, the insured property was burned, before opportunity for reply, held sufficient evidence that he understood the instructions of his superior to be a direction to cancel, and a recognition of the authority of the latter to so order. *Phoenix Ins. Co. vs. Pratt*, 301.

12. **RESPONSIBILITY FOR DELAY IN PROOFS.**—The policy required that notice of death should be immediately given in writing to the home office by the assured or his representatives, and proofs within seven months. The agent who procured the risk notified the company in place of the representatives, and was supplied by the the secretary with blanks for proofs.

Held, That the company, by its dealings with the agent, authorized the latter to receive the proofs, and was responsible for any delay occasioned by him. *Travelers' Ins. Co. vs. Edwards*, 839.

13. **WAIVER OF OTHER INSURANCE.**—A company has the right to limit in any way the power of its agents and make such limitation a part of the contract with the insured.

Where the policy provided that it should be void in case of other insurance without consent, and that the agent had no power to waive or modify any of its provisions nor to revive the contract in case it became void by a breach of any conditions, a representation of the agent that it will be all right will not avoid a forfeiture when other insurance is procured without the required consent.—*Cleaver vs. Traders' Ins. Co.*, 744.

14. **PAYMENT OF PREMIUM TO BROKER—AUTHORITY OF—CERTIFICATE.**—Block, in New York, applied to Heller, an insurance broker, to place insurance on his stock and fixtures. Heller passed the application over to Anderson, another broker, who in turn sent it to Harrisburg, to one Huntzinger, the general agent of a Philadelphia insurance company. Huntzinger placed the risk with his company, who sent him a policy in Block's name. This policy contained conditions to the effect that the premiums must be paid at the office of the company in Philadelphia, or to an agent expressly authorized in writing to receive them; also that in case of loss there must be furnished a certificate under the hand and seal of the chief of the fire-department, stating that the assured had honestly sustained the loss; and finally, that the policy would not be valid "until countersigned by Huntzinger at Harrisburg." Huntzinger countersigned the policy and forwarded it to Anderson, who gave it to Heller for Block. On January 14, 1881, Heller paid the premium, which he had previously received from Block, to Anderson. That night the insured property was damaged by fire. On January 25, 1881, Anderson forwarded the premium, with others, to Huntzinger, in the regular course of business between them. The latter refused to receive it, and the company declined to pay the loss. In a suit by Block on his policy, *held*, that he was entitled to recover. Huntzinger was the duly accredited agent of the company and did not exceed his authority in countersigning and forwarding the policy. He was also Anderson's principal. The company knew the risk was in New York and that Huntzinger must place it through an agent in that city. It was not error, therefore, for the court to refuse to charge that the company was not liable unless the premium was paid in Philadelphia or to an agent authorized in writing to receive it; but to leave it to the jury, whether the course of dealing by the company did not justify the belief that Anderson was duly authorized to receive the premium.

Block did not furnish the certificate from the chief of the fire-department, because that officer refused to become a party to adjustments. *Held*, that this was immaterial, and that the company had no right to require such a certificate. *Mutual Fire Ins. Co. vs. Block*, 649.

15. **OF COMPANY OR INSURED.**—An insurance agent cannot be considered as the agent of the insured in any matter connected with the issuing of the policy. *Commercial Fire Ins. Co. vs. Allen*, 641.

16. **AUTHORITY OF—SUFFICIENCY OF PROOFS—OF COMPANY OR INSURED.**—The adjuster informed insured that proofs of loss must be forwarded to the company's office, that the authorized local agent who countersigned the policy would not receive them.

Held, That in the absence of any policy-requirement to that effect, a tender of the proofs to the local agent of a company of another State was sufficient.

Held, That where on the trial no questions regarding the character of the proofs were put to the assured by the company, and it did not appear that the local agent objected to their sufficiency, they will be held sufficient on demurrer.

▲ **A policy-provision that any other person than the assured procuring the insurance shall be deemed the agent of the insured, will not make such local agent the agent of the insured.** *North British & Mercantile Ins. Co. vs. Crutchfield*, 178.

LIABILITY FOR NEGLIGENCE.—An agent of an insurance company who for six days fails to notify the assured that his company refuses to take a risk, does not use due diligence, and is liable to said company for a loss occasioned thereby. *Phoenix Ins. Co. vs. Frissell*, 75.

See ACTION 2; APPLICATION 8, 12; BROKER; CONTRACT 2, 3, 4; EVIDENCE 1; FOREIGN COMPANY 4; FORFEITURE; NOTICE; OTHER INSURANCE 1, 3, 4; PLEADING 2; PREMIUM 4; PREMIUM NOTE 3; PROOF OF LOSS 12; RENEWAL 1, 2; RISK 1; SUBROGATION; TAXATION 2; TITLE 12; USURY; VACANT 4.

ALIENATION.

1. **TAX TITLE NOT A SALE.**—A conveyance of the premises by the wife of the insured (in which he joined) to a third person, who simultaneously conveyed the same to the insured, the purpose being to vest in him a tax-title to the premises which had been purchased by the wife, is not such a "sale" as will avoid the policy. *Kyle vs. Commercial Union Ass't Co.*, 330.
 2. **TRANSFER OF POSSESSION UNDER CONTRACT OF SALE.**—After the issue of the policy, the insured entered into a written contract with L., by which the latter agreed to pay \$400 for the property, \$50 being paid down and the balance to be in six payments. The contract provided that if L. should promptly make all the payments, the insured and the insurer should execute a deed, but that time was of the essence of the contract, and any failure in payment should avoid it, and any payments made be forfeited. L. entered into possession under the agreement, and the property was burned before the first deferred payment became due. The policy provided that it should be void in case the property should be sold or conveyed without consent.
Held, That there had been a sale which worked a forfeiture. *Davidson vs. Hawkeye Ins. Co.*, 540.
- See ASSIGNMENT 3; LESSEE; OTHER INSURANCE 5; MORTGAGE; PARTNER; TITLE.

ALTERATION. See RISK.

APPLICATION.

1. **DELAY IN ACCEPTANCE DOES NOT MAKE CONTRACT.**—Where an application for life insurance, and the policy issued thereon, both provided that the policy should not be in force until "signed by the officers of the association, and delivered to the applicant," and the policy was made out after the applicant's death, and, in ignorance thereof, delivered at the place where he had resided, **held**, that it was void.
 In such cases unreasonable delay in acting upon the application does not operate to bind the company to whom the application is made, as insurer. *Misethorn vs. Mut. Reserve Fund Life Ass'n*, 694.
2. **EVIDENCE OF KNOWLEDGE OF CONTENTS.**—In the absence of fraud or mistake a party will not be heard to say that he was ignorant of the contents of a contract signed by him, and where an application is part of the policy, evidence is inadmissible to prove that questions answered in it were not asked the applicant who appended his signature. *Cuthertson vs. N. C. Home Ins. Co.*, 465.
3. **OMISSION FROM ANSWER NOT FRAUDULENT WAIVER OF FORFEITURE—VARIANCE.**—The application contained among others the following question: "Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party and in what companies? If already insured in this company, state the number of policy?" The answer was, "\$10,000, Equitable Life Assurance Society." The insured had applied for insurance elsewhere and had been refused.
Held, That the failure to state this fact was not a fraudulent suppression of facts or misstatement, even though intentional. The response was an answer to only one of the four questions and the company should have required answers to the others if it desired them.
 The application provided that if the insured so far changed his subsequent habits as to make the risk more than ordinarily hazardous, the contract should be void.
Held, That acceptance of a premium after notice of such change was a waiver of forfeiture.

The declaration stated the consideration to be a certain sum and the payment of a certain annual premium, while the policy showed the representations in the application to be also a part of the consideration.

Held, That there was no variance. *Phoenix Mut. Life Ins. Co. vs. Raddin*, 914.

4. ATTACHMENT TO POLICY—AFFIDAVIT OF DEFENSE.—The Pennsylvania act of May 11, 1881, provides that, to constitute the application for life insurance a part of the policy, the policy must contain the application as signed, or a copy thereof, or have such copy attached to it. *Held*, that an affidavit of defense to an action on such a policy, which set up false answers in the application as a defense, but which failed to set out that the policy embraced such a copy of the application, or had it attached, was fatally defective, and that judgment should be entered against the defendant as for want of a sufficient affidavit of defense. *Metropolitan Life Ins. Co. vs. Jenkins*, 974.

5. ISSUES IN CASE OF ANSWERS IN—DRUNKENNESS—SUICIDE.—The issues involved questions and answers in the application as to the general health of the applicant, the use of alcoholic stimulants, and whether he ever got drunk; it was also claimed that the insured committed suicide by the use of poison, but there was no positive proof.

Held, That the issues were questions of fact, and a finding in the court below was conclusive.

Held, That in such issues the possible action of the company in case other answers had been made in the application is not admissible. *N. W. Benevolent & Aid Ass'n vs. Hall*, 406.

6. LEGAL EFFECT OF—WARRANTY OR REPRESENTATION IN CASE OF FRAUD.—The plaintiff, by setting up the application, makes the legal effect the same as if every fact therein stated had been expressly averred.

Where the application is a part of the policy and a warranty, its statements will be deemed material, and if false, even though harmless, or innocently so, no recovery can be had as a general rule, but in certain exceptional cases such statements may be merely representations.

Where the policy provides that the statements in the application are warranties, and immediately after that if the policy has been obtained through fraud, misrepresentation, or concealment it shall be void, the two must be construed together, and statements in the application not fraudulent are representations, and any defense founded on fraud must be set up and proved.

Matters which appear only in the application, whether warranties or representations, can only be availed of as a defense by proving their falsity or breach. But the plaintiff must aver and prove, or offer to prove, performance of the agreement. *Continental Life Ins. Co. vs. Rodgers*, 417.

7. TRUTH OF ANSWER IN.—Where the absolute truth of an answer in the application is not warranted, the answer must be according to reasonable belief and not misrepresent or suppress known facts. *Senn vs. Supreme Lodge*, 698.

8. WHEN ANSWERS ARE FILLED IN BY AGENT—MEDICAL ATTENDANCE—VARIANCE—EVIDENCE OF HEALTH.—Evidence that the agent, having verbally received answers from the insured to questions in the application, had after securing her signature in blank, afterwards on his own motion gone away and filled out the application, did not justify an instruction from the court that the answers could not be considered those of the insured. The question was for the jury whether the answers as written did not agree with those verbally communicated.

An instruction regarding an answer as to last medical attendance, that the jury were not to consider any merely social call of a physician, but an attendance for sickness, was error in the absence of evidence of such call. They should have been instructed that the attendance must have been for some ailment of importance, not for some trivial matter.

Where a subsequent application was made for a second policy, the insurer was not bound to take note of the variance of the answers made in the first application and are not precluded from setting up false answers in the second.

Some disease of a serious nature must be found in order to find the answer of "good health" untrue.

Where the application stated that insured had been treated by Dr. H., it was error to exclude the evidence of Dr. H. as to the fact. *Brown vs. Metropolitan Life Ins. Co.*, 446.

9. EFFECT OF A REVIVAL UPON STATEMENTS IN.—When a life insurance policy has become forfeited by non-payment of premiums, and a "revival application is made, asking that the policy be revived, and containing representations as to the insured during the period between the issuing of the policy and the date of the revival application, and a warranty that such representations (as well as the representations of the original application) are true, and that otherwise the insurance will be void, and containing also an agreement that the liability of the insurer is not to exist until the revival is assented to, and when the insurer afterwards assents by a written approval of the revival application, *held* (1) that, upon such assent, the original contract, with all its terms, became re-instated, and there were also incorporated into the contract, which then arose, the new terms expressed in the revival application, and thereby the representations therein contained became part of the contract, and that the truth of each was warranted; (2) that a statement in the revival application, that insured had not, during the period covered thereby, been "sick or afflicted with disease," was not necessarily to be inferred to be false from the fact that insured had a "cold," (3) but a statement that insured had not "consulted or been prescribed for by a physician" was shown false by proof of such a prescription, although it appeared to have been given for a "cold," and the nature of the prescription did not appear. *Metropolitan Life Ins. Co. vs. McTague*, 655.

10. DISCREPANCY AS TO AGE IN CASE OF BENEVOLENT ASSOCIATION.—ESTOPPEL.—A benevolent society answered in defense that its by-laws, which were known to the applicant, prohibited the insurance of persons under the age of eighteen years and that the applicant fraudulently misrepresented his age as eighteen. To this it was replied that his age was truly stated to the agent as seventeen years and ten months and the latter informed him that two months would make no difference.

Held, That the reply was good on demurrer.

Held, That a copy of the by-laws should be set out in the answer.

Held, That where the proofs of death showed the discrepancy, and the society failed for eighteen months to offer to rescind the contract or return the premiums, until suit was brought, it will be estopped from setting up the discrepancy in defense. *Gray vs. Nat. Ben. Ass'n*, 705.

11. QUESTION TO MEDICAL EXAMINER AS TO DRINKING.—Where the issue was whether the statements of insured in the application regarding the drinking of liquor were true, questions to the medical examiner whether the application would have been favorably passed on if the answers had been different, were properly objected to. *N. W. Benev. Mut. Aid. Ass'n vs. Hall*, 216.

12. RESPONSIBILITY OF AGENT FOR MISDESCRIPTION.—The insured signed an application which was blank as to the location of the property, and the location was afterwards, as alleged, incorrectly filled in by the agent. The policy corresponded with the application, and the mistake was not discovered until after the loss.

Held, That insured was entitled to aver the alleged misdescription in his complaint and to prove without asking a reformation. The act being that of the agent, the company was estopped from setting up the misdescription as a defense. *Phœnix Ins. Co. vs. Allen*, 293.

13. **STATEMENTS AS TO BUSINESS.—BREACH OF WARRANTY.**—The application, which was a warranty, contained the following questions and answers: "A. For the party whose life is proposed to be insured, state the business carefully specified." Ans. "Real estate and grain dealer." "B. Is this business his own or does he work for other persons, and in what capacity?" Ans. "His own." "C. In what occupation has he been engaged during the last ten years?" Ans. "Real estate and grain dealer." "D. Is he now, or has he been engaged in or connected with the manufacture or sale of any beer, wine, or other intoxicating liquors?" Ans. "No." The evidence was undisputed that the applicant had previously been engaged in the business of keeping a hotel at Binghamton from May, 1874, until March, 1877, and that during that period he regularly and systematically sold wines and liquors in bottles of various sizes, bearing the name of his hotel blown into the glass, to such of his guests as desired them. He kept a wine or liquor room in which was stored a large supply of wines and liquors, and each year while so engaged he applied, paid for, and received from the representatives of both the State and national governments licenses and permits authorizing him to carry on the business of selling beer, wine, and liquors at retail, to be drank upon his premises. It also appeared that he kept no bar and did not sell to persons who were not his guests. *Held*, That these facts constituted a breach of warranty as a question of law, and it was error to submit the question to a jury as one of fact.

There was no evidence that insured had ever been engaged in real-estate or grain business, beyond a temporary speculation in grain and building upon some property belonging to his wife; the history of his life as related by himself, showed that his only occupation had been that of a hotel-keeper.

Held, That the statements regarding his business were false and a breach of warranty, and should have been so ruled as a question of law. *Dwight vs. Germania Life Ins. Co.*, 26.

See **BENEVOLENT SOCIETY.**

APPORTIONMENT. See **TITLE 7.**

ARBITRATION.

1. **NOT A WAIVER OF FORFEITURE.**—In an action to recover on a fire insurance policy, the fact that the company's agent goes to the scene of the fire, and makes inquiries, and requests an arbitration, which is expressly provided for in the policy by a provision that the policy-holder shall pay half, and that the same shall not work a waiver of any of the insurance company's conditions in the policy, does not constitute a waiver by the company of any right of forfeiture. *Briggs vs. Fireman's Fund Ins. Co.*, 471.
2. **A WAIVER OF PROOFS—DEFECTIVE COMPLAINT.**—Where the company joins in an arbitration and sets up the award as a defense, it thereby waives the policy-provisions regarding proofs of loss, even though the policy stipulates that no provision therein shall be waived except by written indorsement. The policy provided that no suit should be sustainable until after an award had been obtained. *Held*, That a complaint which neither alleges an award nor an excuse for not obtaining it, is fatally defective. *Carroll vs. Girard F. Ins. Co.*, 764.
3. **WHEN IT DOES NOT BAR A SUIT.**—When the parties to an executory contract agree that all questions of difference or dispute which may arise between them in reference thereto, or that the amount of any claim arising therefrom shall be first submitted to the arbitrament of a single individual or tribunal named, they are bound by their contract, and cannot seek redress elsewhere, until the arbiter agreed upon has been discharged, either by the rendition of an award or otherwise. But, where the contract does not provide for submitting matters in dispute to any particu-

lar person or tribunal named, but to one or more persons to be mutually chosen by the parties, it is revocable by either party, and such a provision is not adequate to oust the jurisdiction of the courts having cognizance of the subject-matter of the dispute. Nor is the applicability of this principle disturbed by a provision in the contract that no suit should be brought until after the award of the arbitrators shall have been filed. *Commercial Union Ins. Co. vs. Hocking*, 567.

4. **POWERS OF.**—Where the power of arbitrators is restricted to a finding as to the amount of loss, and not extended to the validity of the contract or other questions, a finding of the court below which seems from the record that the submission to arbitration was a waiver of all other questions in controversy, is sufficient ground for a new trial. *Hastinger vs. Long Island Ins. Co.*, 69.
5. **NO BAR TO SUIT.**—A policy-provision that no action shall be maintained until the matter in dispute has been submitted to arbitration at the request of either party, where no request for arbitration had been made, will not bar a suit. Such suit is a revocation of the agreement as to arbitration which was revocable at common law. *Nurney vs. Fireman's Fund Ins. Co.*, 223.

See VALUATION 3.

ARSON.

QUANTUM OF EVIDENCE.—Where arson is set up as a defense in a civil suit on an insurance policy, it is not necessary, as in case of a criminal charge, that the evidence must exclude all reasonable doubt. The rights of the parties in a civil action are to be determined by the preponderance of evidence. *Continental Ins. Co. vs. Jachnichen*, 491.

ASSESSMENT.

1. **OF DEPOSIT NOTES OF INSOLVENT MUTUAL CO.**—The So. Mut. Ins. Co. conveyed to C. & McG. all its assets in trust for its creditors, and the trustees brought suit against the company and its mutual policy-holders, asking that assessments be made upon the "deposit-notes" of the policy-holders to pay the creditors; the several claims against the numerous defendants were less than \$500, but the aggregate of the claims of the plaintiffs exceeded that sum. *Held*:—

The aggregate of all the claims is the plaintiffs' demand against all the defendants; it is the matter in controversy, and this court has jurisdiction upon appeal by the plaintiffs.

The trustees represent the insured creditors, whose debts exceed the jurisdictional sum, and upon this ground also the court has jurisdiction.

Policy-holders in the So. Mut. Ins. Co., in pursuance of its charter, gave premium or deposit notes conditioned to be paid at such time or times, and in such sum or sums, as the directors may require to pay the expenses and losses of the company; "the company suspended business and conveyed its assets to trustees for benefit of its creditors; in suit by the trustees to assess the deposit-notes of the policy-holders whose policies had not expired at the date of suspension, to pay creditors.

Held, The deposit-notes are liable to be assessed for all loss incurred before the expiration of the policies, and the assessments may be made after the expiration of the policies. *Cabell & McGuire vs. Southern Mutual Ins. Co.*, 134.

2. **LIABILITY OF BENEVOLENT SOCIETY IN CASE OF FAILURE TO MAKE.**—Where a policy contains an undertaking on the part of the insurance company to pay the beneficiary therein named \$2,000 upon the death of the insured, and not to exceed 75 per cent of the assessments collected, the beneficiary

may recover on said policy without proving demand on the company to make assessments, or showing that assessments have been made, or, if made, the amount collected thereon. *Kansas Protective Union vs. Whitt*, 853.

See BENEVOLENT SOCIETY 3, 7, 15; MUTUAL COMPANY 3; PREMIUM-NOTE 2.

ASSIGNMENT.

1. **TITLE IN CASE OF INSOLVENCY.**—Suit was brought by assignees under a general assignment for benefit of creditors after a loss, and the policy was also assigned by an indorsement of insured with consent of agent. The policy was made part of the exhibit.
Held, That where the answer virtually concedes the assignment, though admitting nothing as to its terms, the title of assignee is sufficiently made out. *Lewis vs. Knoxville F. Ins. Co.*, 586.
2. **OF BENEFIT CERTIFICATE.**—While life insurance policies are not ordinarily assignable like a promissory note, if a benefit-certificate assignable by its terms is assigned for land the assignee cannot claim to have the assignment set aside and to recover the land on the ground that it was not assignable. *Jackson vs. Anderson*, 890.
3. **IN CASE OF ALIENATION.**—A fire-policy was assigned with consent of the company to B and subsequently without notice to B or the company the property was conveyed to C in violation of the policy.
Held, That the policy was void as to the assignee as well as the original insured and the case is not affected by an act permitting the assignee of a non-negotiable instrument to sue in his own name subject to every defense as if in the hands of the assignor. *Svenson vs. Sun Fire Office*, 858.
4. **WANT OF CONSIDERATION—WIFE'S POLICY.**—A father induced his children to release their interest in a policy of insurance which they were entitled to as heirs of their mother. *Held*, they could not afterwards set up the want of consideration for the release, as against a third party, a creditor of the father, to whom the policy had been assigned; but one of the children being a married woman at the time of executing the release, it was void as to her.
 Where a wife owned a policy of insurance, and the husband, after her death, joined in assigning the policy as her administrator, saying nothing about his interest as her distributee, *held*, he passed his entire interest under 1 Acts 1869-79, p. 61, providing that a policy owned by a married woman inures to her separate use, independently of her husband. *Lee vs. Page*, 230.
5. **OF CLAIM NOT A FRAUD AS TO PROOFS—AMOUNT OF RECOVERY.**—Where the only statement of a policy-holder in making proofs of his loss, and of the party entitled, was as follows: "Amount claimed of [company, so much]". The property insured belonged exclusively to J. P. Lamb [his name], and it is shown that he had previously transferred a portion of his claim—the court will not hold this to be "a fraud, or attempt at fraud," or "false swearing," to, or in relation to, the proofs of loss, such as, by a condition of the policy, will render it void.
 A voluntary assignment of a portion of his claim against an insurance company by the assured, which has been accepted by the assignee, does not disentitle the assured to his claim, but he is entitled, notwithstanding such assignment, to recover the full amount of the loss. *Lamb vs. Council Bluffs Ins. Co.*, 123.
6. **WHEN VALID WITHOUT INSURABLE INTEREST.**—The insured assigned a policy on his life to a creditor not merely as security, but absolutely in full payment of the debt. The assignee again assigned it to a savings institution as security for a debt. H. subsequently purchased the debt and succeeded to all the rights of the institution. In a contest between the orig-

inal assignee and H. on the grounds that the latter had no interest in the insured and therefore no right to the proceeds;

Held, That H. was entitled to the funds. *Connecticut Mutual Life Ins. Co. vs. Fisher*, 595.

7. RIGHT OF ACTION.—The policy had been assigned by G. to K. as collateral security for a debt.

Held, That suit might be in the name of K., or of G. for the use of K. *New Orleans Ins. Co. vs. Gordon*, 496.

8. WHEN VALID WITHOUT INSURABLE INTEREST.—The holder of a policy of insurance on his own life, valid in its inception, may assign or dispose of the same as he may of any other chose in action, if there is nothing in the terms of the policy to prevent.

The assignee or purchaser of such policy, transferred according to its terms, is entitled to the proceeds of the same, notwithstanding he may have no insurable interest in the life insured. *Murphy vs. Red*, 481.

See INSURABLE INTEREST 4, 9; INTOXICATION; SUBROGATION; TITLE.

ATTACHMENTS. See BENEVOLENT SOCIETY 7.

BAILEE.

1. CONTRIBUTION IN CASE OF GOODS ON STORAGE.—The policy limited its liability to loss affecting the interest of the insured and provided that goods on storage must be separately and specifically insured. The policy was on merchandise their own, or held by them in trust or on consignment, or sold but not delivered, and insured against all loss * * not exceeding the interest of insured. Goods on storage by the insured warehousemen were separately and specifically insured by other insurance obtained by the depositors.

Held, That the policy was not liable for goods on storage in which the insured had no interest, and there could be no contribution with the insurers of such goods. *Home Ins. Co. vs. Gwathmey*, 338.

2. INSURABLE INTEREST—CONTRIBUTION.—The policy insured the M. Transportation Co. for account of whom it may concern, on merchandise its own or in its charge or custody as carriers, and for the amount of earned freight and charges if any; loss payable to the treasurer for account of whom it may concern. Property was burned while stored in charge of the company, the owners of which held floating policies covering it while in transport. Under the bill of lading the company was exempt from liability for loss by fire.

Held, That the company as bailee, though without pecuniary interest, might insure for the owners, and where such appears to be the motive, the insurance will inure to the benefit of the owners.

Held, That where such insurance contemplates contribution from other insurers, a court will construe the contracts of such other insurers, though not parties to the action, to determine the contributive liability of the policy in dispute. *Fire Ins. Ass'n vs. Merch. & Miners' Trans. Co.*, 618.

BENEFICIARY. See BENEVOLENT SOCIETY; TITLE 13.

BENEVOLENT SOCIETY.

1. RIGHTS OF BENEFICIARY.—In case of benefit societies the original beneficiaries named in the certificate may be changed with the consent of the insured and the society in Indiana. The beneficiary acquires no vested rights until the death of the member. In this respect such an association differs from an ordinary life company. The consent of the beneficiary is not necessary to such a change. *Masonic Mut. Ben. Ass'n vs. Burkhardt*, 297.

- 2. TITLE TO FUND—CONSTRUCTION OF CHARTER.**—A became a member of a co-operative insurance company, incorporated under St. 1877, c. 204, which provided that such corporations might, for the purpose of assisting the widows, orphans, or other dependents of deceased members, provide "for the payment by each member of a fixed sum, to be held by such association until the death of a member occurs, then to be forthwith paid to the person or persons entitled thereto." A named as his beneficiary in his application for membership his wife, to whom the sum named in the certificate issued to him was payable, "subject to such further disposal among the dependents of said A as he might thereafter direct, in compliance with the laws of said corporation." A's wife died before the death of A.

Held, That A could not by will dispose of this money to B, to whom he was engaged to be married, and that such bequest was void and of no effect.

Held, That the fact that B was engaged to be married to A imposed no obligation upon A except to carry out his contract with B, and did not, in any sense, by itself, make her dependent upon him, and that she did not come within the class of persons which, if able, he was bound by law to support.

Where the by-laws of a co-operative insurance company provided that, in the event of the death of all the beneficiaries selected by a member, before his decease, if no other further disposition thereof be made, the benefit shall be paid to the dependent heirs of the deceased member, and the member dispose of the benefit, such disposition being rendered null and void by the statute. *Held*, that the mother of the member, his sole heir at law, and dependent upon him, was entitled to receive said benefit.

A was a member of a co-operative insurance company, and by the terms of the certificate issued to A the sum of \$2,000 was to be paid to B, the wife of A, the person named in his application, or to such person or persons as he should subsequently direct by will, or otherwise, etc. B died before A, and the latter designated C, in his will, as the beneficiary under the certificate. Before the death of A, but after the issuing of the certificate, the by-laws of the company were amended, providing that the fund should be paid "to the widow and the children of the deceased, and, if none, then to the father, mother, sisters, and brothers, share and share alike, or he may name a party at the time he becomes a member, to whom the money shall be paid at his death," etc. St. 1882, c. 192, § 2, added to the class, after the word "orphans," the words "or other relatives of deceased members." The by-laws creating the new class of beneficiaries were not enacted after the statute of 1882 took effect.

Held, That C was not entitled to the benefit-fund; and that a sister of A, with whom he resided, was not entitled to the fund unless she was dependent upon him for support. *Supreme Council vs. Perry*, 280.

- 3. NON-PAYMENT OF ASSESSMENTS—RE-INSTATEMENT—ALLOTMENT OF FUNDS—RECORDS AS EVIDENCE.**—Suspension or non-payment of assessments defeats the good standing of the member of a benevolent society, and insanity or tender to an unauthorized party will not excuse non-payment.

Conditions of the constitution as to re-instatement must be complied with, and the decisions of a tribunal provided by the constitution and by-laws as to re-instatement is binding.

Where a widows and orphans' benefit-fund and a sick benefit-fund are constituted as separate, benefits attaching to the one cannot be paid from the other.

In order to share in sick-benefits the prescribed rule of reporting to the lodge and securing its favorable action must be followed.

The records of the lodge cannot be contradicted by parol. *Hawshaw vs. Supreme Lodge*, 273.

- 4. DISTINGUISHED FROM AN INSURANCE COMPANY.**—A relief society, where the object is the benefit not of widows of deceased members or members who

have received a permanent disability, but of certain members themselves, and the appointee of the insured, must be deemed an insurance company and not a benevolent society, within the statutes of Illinois. *Golden Rule vs. People*, 203.

5. **EFFECT OF BY-LAW AS TO BENEFICIARIES.**—By-law of a benevolent association authorized a committee to determine whether a member was entitled to sick-benefits, and provided that "they were to be the only and final deciders thereof."

Held, That the by-law was reasonable, and a part of the contract of insurance in a mutual benevolent or co-operative order, and the members were bound by its terms when the committee act in good faith. *Van Poucke vs. Netherland St. Vincent De Paul Soc.*, 142.

6. **MISREPRESENTATIONS AS TO HEALTH.**—A condition in a certificate of membership in a mutual aid association, that it shall be null and void if any of the statements or answers made by the member in his application concerning his health are untrue, is waived if the certificate is issued by the association with actual knowledge of the condition of the applicant's health.

A mutual aid association is estopped to avoid a certificate of membership on the ground of erroneous statements contained in the application, if, with full knowledge of all the facts, it has continued to recognize the certificate as a valid and subsisting contract by making and receiving subsequent assessments upon it. *Ball vs. Granite State Mut. Aid Ass'n*, 395.

7. **PROCEEDINGS TO ENFORCE A JUDGMENT.**—Where judgment has been obtained against a benefit-association for the amount of a benefit due the widow of a member and execution is returned unsatisfied;

Held, That no further proceedings could be taken at law and an application for mandamus to compel an assessment, which the company claims to be already making in good faith, must be denied. Further proceedings for sequestration if proper must be pursued in a court of equity under How. St. of Michigan. *Miner vs. Trustees*, 571.

8. **CHANGE OF BENEFICIARY—DISPOSITION BY WILL.**—The certificate of a benevolent society was payable to the executors for the benefit of a daughter of the insured. The by-laws provided that benefits were to be payable to dependent beneficiaries, and that upon surrender of the certificate a new one might be issued payable to such dependent beneficiaries as the insured might direct.

Held, That the beneficiary could only be changed by a surrender of the certificate.

Where the insured by will directed his executors to pay his debts from the benefit in a certain case; to invest the proceeds for the benefit of his daughter, and in case of her death to divide them among certain parties.

Held, That the insured could not dispose of the proceeds by will, the executors could only collect the money and pay it over to the guardian of the daughter. *Holland vs. Taylor*, 609.

9. **CONSTRUCTION OF CHARTER AS TO BENEFICIARY.**—The charter of a benevolent society stated the object "to provide benevolence and charity by establishing a widows and orphans' fund * * from which a sum * * shall be paid to his family or as he may direct."

Held, That the member had absolute power to designate the beneficiary, who need not be a member of his own family. *Mitchell vs. Grand Lodge*, 604.

10. **RIGHTS OF BENEFICIARY IN CASE OF CHANGED CERTIFICATE.**—A beneficiary acquires no vested right to the benefits which are to accrue upon the death of a member of a mutual benefit and charitable association until such death occurs, and the member may exercise the power of appointment without the consent of such beneficiary, and without restriction other than such as may be imposed by organic law, or the rules and regulations of the society.

Where the original beneficiary in such case brings an action upon a changed certificate, and any proper regulation of the society has been violated by such change, he must aver and prove the same.

The general rule is that the right to change a beneficiary in a mutual benefit society, by mutual agreement of the association and the member, exists independently of its constitution and by-laws, and may be exercised whenever it is not limited directly or impliedly by such constitution or by-laws; and the act of March 2, 1877 (Rev. St. Ind. 1881, § 3,850), did not change the rule, except to prevent any future restrictions in the constitution or by-laws of such society upon the contract or the rights of the parties to change the beneficiary. *Masonic Mutual Benefit Society vs. Burkhart*, 685.

11. **CHANGE OF BENEFICIARY—INSURABLE INTEREST.**—Where the articles of association and by-laws of a benevolent society provide that the benefit is payable to the person designated by the member in his application or by will, a member may at any time change the designation of the beneficiary with the consent of the society, regardless of insurable interest. *Lamont vs. Hotel Men's Mut. Ben. Ass'n*, 696.

12. **TITLE TO FUND.**—By the charter of a beneficiary association, the persons whom the insured could designate as beneficiaries were limited to his widow, his orphan children, and other persons dependant upon him, and the by-laws of the association provided that, if the insured made no designation, the amount should be paid to his widow, or, if he left no widow, to a guardian or trustee of his minor children. The insured, at the time of making his designation, had a wife and two daughters, and in his application for membership, in answer to the question, "To whom will you have your death-cess paid?" answered, "To my heirs," and in reply to a request to state the relationship of any of the persons to whom payable, answered, "Wife or daughters." *Held*, that upon the death of the insured, the money was to be paid to the widow. *Addison vs. N. E. Com. Travelers' Ass'n*, 732.

13. **TITLE TO FUND.**—The charter of X. declared its purposes to be "benefiting and aiding the widows and orphans of deceased members." A by-law provided that the benefits on the death of a member should be payable "to such person as the deceased may have designated to receive the same as appears on the books of the lodge of which he is a member." A., a member of X., designated his sister, B., from whom he had borrowed money, as the person to whom the benefits were to be paid. A. died, leaving a widow and minor children. B. paid A.'s dues during his illness, up to the time of his death. *Held*, that B. was entitled to the benefits, to the exclusion of A.'s widow; that, in the absence of any prohibitory or restrictive language in the charter denying to X. the right to contract specially with the member for the payment of benefits to persons other than his widow or orphans, the designation of B. was valid, and that such contract was not void by reason of necessary implication from the language of the charter. *Manceley vs. Knights of Birmingham*, 738.

14. **CONSTRUCTION AS TO PAYMENT OF DUES.**—The practice or interpretation of its rules by a benevolent association will not alter the real meaning of the words used to express them when not ambiguous.

Where the constitution of such a society provides that a benefit-certificate is not forfeitable until payment is six months in arrears, the fact that they were customarily paid at the beginning of a term or before the six months expired will not make them demandable or due until the expiration of that term. *Wiggin vs. Knights of Pythias*, 754.

15. **ACTION TO RECOVER ASSESSMENT.**—In an action at law against a mutual benefit association to recover the amount of an assessment upon the members which the association have refused to make, *held*, on demurrer, that the action cannot be maintained. In such a case the remedy is by a proceeding to compel the association to make the assessment. *Ranisbarger vs. Union Mut. Aid Ass'n*, 792.

16. **EFFECT OF APPEAL IN CASE OF EXPULSION.**—An expelled member of a benevolent association, on appeal, was re-instated, but died pending the appeal.
Held, That his representative was entitled to the benefit, the appeal did not abate by death. *Marck vs. Supreme Lodge*, 796.

17. **ATTACHMENT OF BENEFIT.**—A member of a subordinate council entitled to a voice in its representation in the supreme council of a benevolent order is a member of that order, and a benefit payable to the widow of such member cannot be attached by a creditor of the widow as in ordinary life insurance, while in the hands of the association. *Saunders vs. Robinson*, 872.

See ACCIDENT 2; APPLICATION 10; ASSESSMENT 1; ASSIGNMENT 2; INSURABLE INTEREST 5, 9.

BROKER.

PAYMENT OF PREMIUM TO—AGENT TO RECEIVE CANCELLATION.—The policy was procured by a broker from the agents of the company. Subsequently the latter notified the broker that the company "desire to cancel the policy. * * The same will be held binding until the 28th inst. 12 o'clock noon. After that date the company will not be liable for any loss." The broker had acted for the company for two years in procuring its insurances which were left to his discretion as to companies and rates, he apparently retaining the policies. No objection that he was not authorized to receive the notice was made by the broker at the time.

Held, That where the broker was debited for the premium in his account with the agent and no cash had been paid, no tender of unearned premium was necessary.

Held, That under the circumstances the broker was the authorized agent of the insured to receive notice of cancellation. *Stone vs. Franklin Ins. Co.*, 660.

See AGENT 14.

BUILDING. See CONSTRUCTION 1; RISK 2.

BY-LAW. See BENEVOLENT SOCIETY.

CANCELLATION.

1. **WHAT IS NECESSARY TO COMPLETE.**—A statute provided that within thirty days prior to the maturity of a note given for the premium, the company should serve a notice that it was due, or to become due, and unless paid within thirty days "his policy will be suspended. The company may state in said notice the amount which will be due * * and also the amount necessary to pay the customary short rate * * up to the time the policy is suspended, under the notice in order to cancel the risk."

Held, That the word "may" was not merely permissive, but expressive of a step that was necessary to the exercise of the right of suspension. Unless notice of the required amount of short rates was also given, the policy will not be suspended.

Held, That application for an extension of time on the note did not affect the case. *Boyd vs. Cedar Rapids Ins. Co.*, 219.

2. **TRANSFER OF RISK AFTER A LOSS.**—N. had insured a mill through B. in the Clinton Company. On August 9th the mill burned down; on August 10th N. notified B. of the loss, who then telegraphed N. to come to his office, where he informed him that, on August 1, the Clinton Company had ordered the policy on the mill canceled, and that he, B., had placed the risk with the Lancashire Company, for which he was also the local agent. N. objected to surrendering his Clinton policy, but was induced to do so on the representations of B. that the Lancashire Company was good and safe. Proof of loss was made to the Lancashire Company, and suit brought to

recover the insurance. The supreme court reversing the court below. *Held*, that it was error to have permitted the case to go to the jury; that under the plea of non est factum there was no evidence of the execution and delivery of the policy; that no consideration had passed, and that the action of B. was a fraud on the defendant company; that the Clinton policy was valid up to the time when B. induced N. to surrender it, and therefore there could have been no transfer of the risk until after the 9th, when the fire took place. *Lancashire F. Ins. Co. vs. Nill*, 309.

3. **SUBSTITUTION OF POLICY AFTER A LOSS.**—A, acting under instructions from B to procure insurance upon certain property in some good company, applied to C, an agent of the U. Co. C delivered to A a policy, countersigned by C, in the U. Co. A then delivered the policy to the plaintiff, B. Afterwards, on April 23, 1883, C was instructed by the U. Co. to cancel the policy. C then entered the risk in the policy-register of the defendant company, and wrote the policy in suit, immediately notifying the defendant of the same. On April 28, 1883, the building insured was burned, and on the same morning C, who had no knowledge of the loss, mailed the policy in the defendant company to A, accompanied by a letter dated April 27th, informing him that the U. Co. had declined the risk, and requested an exchange of policies. On the day the letter was sent to A containing the policy in the defendant company, C received a letter from defendant, dated April 26th, declining the risk. On the same day, April 28th, A notified C of the loss by telegraph, after the receipt of the policy by A, and C received the telegram. On the same afternoon C, after receiving defendant's letter declining the risk, went to the place where the property was located, and the plaintiff, at the request of A, handed the policy in the U. Co. to A, and accepted the policy in the defendant company in exchange. Each company returned to plaintiff the premiums paid, and refused to pay the loss.

Held, That the plaintiff could not recover the amount of his policy from the defendant company. *Wilson vs. N. H. Ins. Co*, 418.

4. **LIABILITY ON PREMIUM-NOTE.**—A premium-note payable in four annual installments was given for the insurance. After the first installment became due the insured mailed the policy to the company and requested a cancellation.

Held, in an action on the note that the insured was liable for the installment due at the time of the rescission. *American Ins. Co. vs. Garrett*, 102.

See AGENT 11; BROKER; MORTGAGEE 1; PROOFS OF DEATH.

CAPITAL.

WHAT CONSTITUTES IN CASE OF LIFE COMPANIES IN NEBRASKA.—That part of sec. 6, ch. 16, of Nebraska Statutes of 1885, which requires of insurance companies a capital of \$100,000 refers to life-companies organized within that State as well as elsewhere. Bankable notes cannot be considered a part of the capital within the statute. *In Re Babcock*, 794.

CARGO. See OVER-INSURANCE.

CARRIER. See NEGLIGENCE.

CO-INSURANCE. See REFORMATION 2.

COLLISION.

LIABILITY FOR PARTIAL LOSS.—A policy which provides that the company is not to be liable for any partial loss "on the vessel or freight, unless it amounts to 7 per cent exclusive of all charges," etc., covers the damages which the owners have been compelled to pay for injuries to another vessel from a collision occurring through the negligence of those in

charge of the vessel insured, the policy having a clause annexed to the margin by which the company agreed to "cover the risk of loss by collision according to the decisions of the Supreme Court of Massachusetts prior to 1853, provided that the company shall not in any case be liable for a greater sum than the amount insured by this policy." *Worff vs. Equitable Marine Ins. Co.*, 380.

CONSTRUCTION.

1. **DATE OF BUILDING.**—A fire insurance company, in defense of a claim for loss under a policy, cannot maintain that the plaintiff's answer in his application was false in stating that the house insured was "built" at a certain date, on the ground that it was then built partly out of materials from an old house pulled down, and that the words "when built" refers only to buildings constructed entirely of new material; and the court will exclude evidence as to the meaning of the word "built" among insurance men. *Lamb vs. Council Bluffs Ins. Co.*, 123.
2. **STANDING CROPS.**—B., an insurance company, included in a policy issued by it to C. an insurance upon "stock, crops, and farming implements;" during the running of the policy a field of growing wheat belonging to C. was in part destroyed by a hailstorm; he presented a claim to B. for payment on account of his loss, which B. declined to pay, as the crop destroyed was a standing one; he then brought suit against B. *Held*, that he could recover. *Mutual F. Ins. Co. vs. De Haven*, 119.

See VOYAGE 2; WARRANTY.

CONTAINED IN.

IN CASE OF ANIMAL STRUCK BY LIGHTNING.—The policy insured horses against fire, "all contained in * * frame barn, situate, etc." A lightning-clause was attached stipulating that it insured against damage from lightning, "subject in all other respects to the terms and conditions of the policy." A mare was killed while pasturing in a field on the farm.

Held, That the clause must be construed as referring only to such terms and conditions as were applicable to it.

Held, That the insurance against lightning contemplated a danger existing chiefly at a season when the stock are usually much in the fields, and hence covered the animal while in the field. *Haus vs. Fire Association*, 402.

CONTRACT.

1. **WHEN INCOMPLETE.**—The agent informed the applicant that he had no authority to insure the property in question, which was of a peculiar kind, but executed a policy which was placed in the hands of a third party to hold until he could learn whether the company would accept the risk. The latter declined it, when the agent reclaimed the policy. The premium had been paid with the understanding that it should be returned if the risk was not accepted.

Held, That there was no contract. *Brown vs. American Central Ins. Co.*, 236.

2. **WHEN INCOMPLETE—KNOWLEDGE OF AGENT.**—The application provided that no liability should attach until it had been approved at the home office. The applicant paid the agent the premium, taking in return a receipt stating that it was subject to the approval of the company, and that in case the company declined to issue a policy it should be returned. The premium and application were forwarded to the company by mail, but were never received, no policy was issued, and no premium was returned, and no one connected with the company except the agent knew that the application had been made until the property was destroyed, nearly five months later.

Held, That the company was not liable. *Atkinson vs. Hawkeye Ins. Co.*, 589.

3. **WHEN COMPLETE.**—The local agent agreed with the insured that he would take the latter's note and advance the first premium. After the policy was mailed for the delivery to the agent the insured was taken sick and subsequently died, and the policy was never delivered.

Held, That the contract became binding when mailed, or at any rate upon reaching the agent, and the company was liable. *Yonge vs. Equitable Life Ass'e Soc.*, 876.

4. **WHEN COMPLETE—ACTS OF AGENT.**—Where a soliciting agent of the company was authorized by an applicant to receive and forward a policy to him, and such policy duly made out by a clerk of the general agent was placed where the soliciting agent generally kept his papers but was not forwarded;

Held, That the contract was completed if so intended.

Held, That the mere placing of such a policy in the desk of the solicitor without his knowledge, and withdrawing it without his knowledge, would not make a binding contract. *Morrison vs. Ins. Co. of N. A.*, 966.

See AGENT 6; APPLICATION 1; CANCELLATION 2; OTHER INSURANCE 3; PAROL CONTRACT; RENEWAL 2; TITLE 8.

CONTRIBUTION. See BAILEE 1, 2.

CREDITOR. See INSOLVENCY 2; INSURABLE INTEREST 1, 6.

CROPS. See CONSTRUCTION 2.

DAMAGES. See MEASURE OF DAMAGES.

DEPOSIT. See FOREIGN COMPANY.

DESCRIPTION. See APPLICATION 12.

DIRECTOR.

LIABILITY TO RECEIVER IN CASE OF INSOLVENCY.—A director who ignores his duty, and by failure to attend meetings of the board, leaves the active management of the affairs of the corporation to other directors, is thereby guilty of such gross negligence as will make him responsible for many of the acts, if not all, that are not positively fraudulent of those to whom he left such management.

The receiver appointed in a proceeding by the State to wind up an insolvent insurance company, represents the corporation, the stockholders, and the creditors, and as such representative can bring a bill of this nature to enforce the liability of directors for gross neglect of duty, or for fraud, for the benefit of the parties that he represents, and to adjust in one proceeding all the liabilities and equities of the parties in interest. *Bogue vs. Tucker*, 155.

ESTOPPEL. See WAIVER; APPLICATION 10; BENEVOLENT SOCIETY 6; OTHER INSURANCE 3.

EVIDENCE.

1. **AGENT'S KNOWLEDGE OF INCUMBRANCE—OTHER PROPERTY DESTROYED—INTEREST OF WITNESS.**—Where the question in dispute was the agent's knowledge of an incumbrance, a report sent to the company representing the property as unencumbered, but made not by the agent with whom insured negotiated, but by his partner from information derived from him or from some other source, is not admissible as evidence.

Evidence as to other property destroyed not covered by insurance was admissible to rebut the theory that insured did not endeavor to save property, and was in any other case immaterial.

It is not error to refuse instruction that the interest of a particular witness should be considered as affecting his credibility. *Phoenix Ins. Co. vs. La Pointe*, 58.

2. MISREPRESENTATION AS TO AGE.—Instruction to find for the company as a matter of law, in case of alleged misrepresentation as to age is only proper where the evidence is clear and positive and without material conflict. But even in the absence of conflict such instruction would not be proper if the conclusion rested on an inference from h the jury might find the contrary.

Statements as to date of birth in proofs of death may be corrected. The burden of proving the falsity of the representation is on the company.

Instruction to find for the company should be given when there is insufficient evidence to prove a fact essential to recovery. *Alabama Gold Life Ins. Co. vs. Mobile Mutual Life Ins. Co.*, 351.

3. QUANTUM OF FOR JURY.—A mere scintilla of evidence will not justify submission to a jury. If the proof be so overwhelming that a contrary verdict should be set aside the issue should be decided by the court. *Dwight vs. Germania Life Ins. Co.*, 26.

4. DATE OF EXPIRATION—RATE—FACTS RELATING TO INSURED.—Where it is claimed that the date of expiration had been altered upon the policy subsequently to its delivery, the burden of proof is upon the company alleging it.

Where such policy named a specific amount of premium for a specific amount of insurance, the error of excluding evidence as to the rate charged uniformly for a certain term, if any, was harmless, if the rate, according to the policy, neither coincided with that term nor the term as claimed by the insured, but was between the two.

Testimony of the agent regarding certain matters occurring in the lifetime of the original insured, who had since died and whose wife had succeeded to his interest in the property and policy, were properly excluded. *Ins. Co. of N. A. vs. Brim*, 720.

5. PRACTICE—DEMURRER—ASSESSMENT OF DAMAGES—PROOFS OF LOSS.—A demurrer to evidence admits the truth of the testimony demurred to, and all reasonable inferences that may be drawn from that testimony.

When a demurrer to evidence is overruled by the judge, he cannot assess the damages that plaintiff has incurred. In such a case the judge, before discharging the jury, should require them to assess the damages conditionally, or, if he discharges the original jury, he should, upon overruling the demurrer to evidence, call another jury to assess the damages.

When this court holds that the issues were properly found on a demurrer to evidence in favor of the plaintiff, but the judgment of the court below is reversed on the ground that the presiding judge had no authority to assess the damages, the cause will, in the absence of other controlling reasons, be sent back with an affirmance of the findings of the judge, and instructions to call a jury to assess the plaintiff's damages; or it may, if the judgment on the demurrer in the court below is in favor of the defendant, and it is apparent from the record that the plaintiff had not disclosed the whole merits of his case, set aside the ruling of the judge below, and award a venire de novo.

When there is judgment in the court below in favor of plaintiff, and judgment is reversed on the ground that the judge had no authority to assess the damages, and it is apparent from the record that the defendant did not disclose the matters constituting his defense, because the plaintiff had omitted to introduce any evidence by which the jury could assess the damage the plaintiff had sustained, this court, in reversing the case, will award a venire de novo.

A policy of insurance against loss by fire, which provides that such loss shall be estimated according to the actual cash value of the property at the time of the loss, not exceeding the sum insured, leaves the question of value

open; and, before a recovery thereon can be had for other than nominal damages, proof of the actual cash value of such property at the time of the loss must be produced to the jury.

Where the assured party has made written proofs of loss as required by the policy, and delivered such proofs to the insurer, secondary evidence of their contents cannot be introduced by the assured, unless he has given notice to the insurer to produce such proofs, and he has failed to do so. *Hanover F. Ins. Co. vs. Lewis*, 956.

See ACCIDENT 3; ACTION 2; APPLICATION 8, 11; ARSON; BENEVOLENT SOCIETY 3; CONSTRUCTION 1; FOREIGN COMPANY 1; FORFEITURE; INVENTORY; INTERPERANCE; INTOXICATION; LIMITATION 5; MUTUAL COMPANY 3; NEGLIGENCE; PROOFS OF LOSS 3, 10; RENEWAL 1, 2; REPLACEMENT 1; RISK 1; SEAWORTHY; SUICIDE 1; TITLE 4; VALUATION 2, 3, 4.

EXPIRATION. See EVIDENCE 4.

FOREIGN COMPANY.

1. EVIDENCE OF JUDGMENT.—It is a rule of inter-State or international law that the courts of another State will not receive, as evidence of a foreign judgment, in a suit brought upon it, any record thereof which does not show on its face that the defendant, if a foreign corporation, was doing business in that State. This is a substantive jurisdictional averment that must affirmatively appear, and not be left to any inference from the bare return of the officer that he has served an "agent." Nor can parol or other proof of the fact be received in aid of the defective record, if the averment does not appear therein. *Henning vs. Planters' Ins. Co.*, 20.
2. CONSTRUCTION OF MICHIGAN DEPOSIT LAW.—A British company which has deposited \$100,000 in New York, as there required, is not thereby exempted from the deposit required in Michigan under the law which exempts in case of a deposit in the State where organized. The license of a foreign company to do business in New York cannot be deemed as constituting that State the place of organization. *Employers' Liability Ass'n Co. vs. Commissioner*, 399.
3. STIPULATION FOR SERVICE.—In Missouri, a foreign insurance company is prohibited from carrying on business until it has filed with the insurance commissioner a certificate stipulating that service may be made upon him; and, where it is alleged in the petition that a foreign company is doing business in the State, it will be presumed that it has complied with the law, and default will be entered on service upon the commissioner, though he have refused to receive the summons. *Knapp vs. Ins. Companies.*, 798.
4. SERVICE UPON AGENT.—JURISDICTION.—CONSTRUCTION OF FOREIGN STATUTE.—In an action in Massachusetts upon a judgment recovered against an insurance company in New Mexico, it appeared that the laws of that Territory required any insurance company doing business there, to appoint an attorney at law in each county where its agencies were established, and to file with the Territorial auditor an instrument which should authorize such attorney to acknowledge service of legal process, and also consenting that any service of process on such attorney should be taken and held to be valid as if served upon the company; that the defendant duly filed such instrument, stating that the firm of K & Co were such attorneys, which instrument remained on file without being revoked at the time of bringing the original action. *Held*, that service of process upon K. was good, although in fact K. was not a member of the bar, and although the firm of K. & Co., consisting of K. and B., had been dissolved, K. carrying on business alone in the name of "K. & Co.," and although the firm, some months previous to the time of serving the process, had ceased to be agent for the defendant. *He'd*, also, that the appointment was irrevocable, unless the revocation might be made by the appointment, duly notified upon the public records, of a new agent, who should be competent to receive service of process.

In an action in this commonwealth, upon a judgment recovered in one of the Territories of the United States, it is competent for the defendant to show, notwithstanding any recitals in the record to the contrary, that the court in which it was rendered had no jurisdiction of the subject-matter of the controversy or the party defendant.

Where the evidence of a foreign law consists entirely of a written document, statute, or judicial opinion, the question of its construction and effect is for the court alone. *Gibson vs. Manf. F. & M. Ins. Co.*, 943.

See MUTUAL COMPANY 2; TAXATION 1, 2; UNAUTHORIZED COMPANY.

FORFEITURE.

ACCEPTANCE OF PREMIUM AS WAIVER—EVIDENCE OF CONVERSATION WITH AGENT—RENEWAL.—The insured was killed while coupling cars, an employment which, according to its terms, avoided the policy. But after engaging in this employment the insured wrote to the agent, who replied that the company would not issue a permit for the business, but recommending that the insured should secure an accident policy which would cover the period of his employment, when the policy would again apply. Afterwards the company sent notice of premiums due, and returned the customary receipt, continuing the policy in force upon their payment.

Held, That the mere act of the insurer in receiving the premium would not waive a forfeiture if paid with the full understanding that the terms of forfeiture would be insisted on. Such waiver or estoppel must be based on the insured being misled. The company could rightfully accept the premium in order to keep the policy in force upon the termination of the employment.

Held. That evidence of a conversation of insured with the agent giving the renewal receipt tending to show such an understanding was admissible.

Held, That the renewal receipt was not a new contract. *N. W. Mutual Life Ins. Co. vs. Amerman*, 321.

See WAIVER, ARBITRATION 1; NON-FORFEITURE.

FRAUD. See ADMINISTRATOR; APPLICATION 3, 6; ASSIGNMENT 5; INSURABLE INTEREST 1; MUTUAL COMPANY 3; OVER-INSURANCE; PLEADING 3; VALUED-POLICY LAW.

GARNISHMENT.

JURISDICTION IN CASE OF PRIOR SUIT.—The policy was issued to a resident of Michigan on property there by a New York company doing business in Michigan and Illinois. Prior to the adjustment of the loss the company was garnished by a creditor of the insured in Illinois in an Illinois court. After the adjustment the claim was assigned by the insured to another party, who brought suit in the court of Michigan for recovery, and obtained judgment. The Illinois case was afterwards tried and judgment obtained there by the garnishee.

Held, That suit having first been commenced in Illinois and control of the subject-matter having been obtained by garnishment, the courts of Michigan had no jurisdiction. *Connor vs. Hanover Ins. Co.*, 385.

See REPLACEMENT 3.

HAIL. See CONSTRUCTION 2.

HEALTH. See APPLICATION 9; BENEVOLENT SOCIETY 6; SICKNESS.

INCUMBRANCE.

MATERIALITY OF REPRESENTATION.—Whether an erroneous description of title by misrepresenting that it was unincumbered, is material, is for the jury to decide. *Sweat vs. Piscataquis Mut. Ins. Co.*, 896.

See AGENT 5; EVIDENCE 1; MORTGAGE.

INSANITY. See SUICIDE 1, 2.

INSOLVENCY.

1. ATTACHMENT OF MUTUAL FUNDS BY POLICY-HOLDERS.—*Laws Conn.*, 1875, pp. 12, 13, §§ 1, 2, provide, in the event that the capital of a life-insurance company becomes impaired, it shall become the duty of the insurance-commissioner to proceed against the company to annul its charter, and to wind up its affairs. The scheme of liquidation provided contemplates the audit and allowance of all demands against the corporation, including therein the reserve due on all outstanding policies, and an equitable application of all the corporate assets to the payment of the demands so audited. The defendant, a mutual insurance company of Connecticut, having become insolvent, the insurance-commissioner, on September 21, 1886, began proceedings in the Supreme Court of Errors of Connecticut to annul its charter, and wind up its affairs. On September 28th, policy-holders in Missouri commenced suits by attachment to recover the reserve-value of their policies. *Held*, that all policy-holders of the company, whether residents of Connecticut or Missouri, were presumed to know the terms of its charter, and the laws regulating its existence, and were bound thereby, in the absence of special provisions for the benefit of its own citizens by the State of Missouri when the defendant was licensed to do business there; that, as the fund attached was not deposited for the benefit of resident policy-holders in Missouri, they can claim no lien thereon; and that the plaintiff must be remitted to his share in the equitable distribution under the proceeding previously commenced by the State of Connecticut, through its insurance-commissioner, on behalf of all the policy-holders of the company. *Fry vs. Charter Oak Life Ins. Co.*, 863.

2. CLAIMS OF CREDITORS—WIFE'S POLICY.—A life-policy taken out by a father when insolvent, for the benefit of a minor child, is not protected against the claims of creditors under the wife's-policy law of Alabama.

Held, That in the event of the father's death the measure of the creditor's interest is not the amount of premiums paid, but the amount of the policy. *Fearn vs. Ward*, 935.

See ASSESSMENT 1; ASSIGNMENT 1; DIRECTOR; PREMIUM-NOTE 2; RECEIVER.

INSURABLE INTEREST.

1. CONVEYANCE TO DEFRAUD CREDITORS.—Where property is conveyed by A to B for purpose of defrauding creditors, and no part of the purchase-money has been paid, B has an insurable interest in the property and is entitled to the insurance-money on a policy taken in her name, and it cannot be taken from her by creditors. *McLean vs. Hess*, 227.

2. OF NEPHEW AND AUNT.—A nephew to whom his aunt was indebted, the amount through unsettled business relations being uncertain, took out a policy on her life, on his own motion and himself paying the premiums, for \$2,000; the indebtedness was subsequently found to have been between \$500 and \$750.

Held, That the assured must have an insurable interest, but this is not necessarily a definite pecuniary interest, but such as will justify a well-grounded expectation of advantage resulting from the life insured.

Held, That the mere relationship of nephew and aunt would not give such an interest, but that the amount and uncertainty of the indebtedness would justify the policy taken in good faith.

Held, That such an interest subsisting at the inception of the contract, and the aunt being in no way a party to the contract, the case is not affected by the fact that the debt was afterwards paid.

Held, That the nephew, and not the representatives of the aunt, was entitled to the insurance-money. *Corson's Appeal*, 99.

3. **WHAT IS SUFFICIENT—OF MORTGAGEE—OF BUILDER.**—To sustain an action on a policy of insurance against fire, there must have been, when the policy was taken out, and when the loss occurred, such right or ownership as amounts to an insurable interest, and the plaintiff must show that he is entitled to assert that interest; but under the forms of pleading prescribed and authorized by the code (form No. 16, p. 704, § 2,979), it is not necessary that the complaint should aver either of these facts.

The modern decisions relaxing the stringency of the earlier cases, admit to the benefit of insurance whatever act, event, or property bears such a relation to the person seeking the insurance that it can be said with a reasonable degree of probability to have a bearing upon his prospective pecuniary condition; yet such connection must be established between the subject-matter insured and the party in whose favor the insurance had been effected, as may be sufficient for the purpose of deducing the existence of a loss to him from the occurrence of an injury to it.

- A mortgagor and mortgagee each has an insurable interest in the mortgaged property, and each may insure for his own benefit; if the debt is paid before the loss or destruction of the property, the mortgagee cannot afterwards recover on his policy; but if a loss occurs before payment of the debt, and the insurer thereupon pays the loss, he is entitled to be subrogated to the rights of the assured, and may enforce the mortgage for his indemnity.

When a builder contracts to furnish materials and build a house for another person at a stipulated price, payable in installments as the work progresses, no property in the house vests in that person until it is finished and delivered, or, at least, until it is ready for delivery and approved.

- If the builder, in such case, takes out a policy of insurance on the house during its construction, and it is destroyed by fire before its completion, the loss is his, although he may have received partial payment by installments; and having assigned the policy to the person for whom the house was built, the latter may maintain an action on it, or may assign it to another person, with whom he had effected insurance on the house. *Commercial Fire Ins. Co. vs. Capital City Ins. Co.*, 81.

4. **IN CASE OF ASSIGNMENT.**—A policy taken out on the life of another in whom there is no insurable interest, or assigned to another having no such interest, is void.

The policy provided for its assignment subject to proof of interest.

Held, That where the assignment purports on its face to be a purchase, the burden of proving interest is on the assignee. *Alabama Gold Life Ins. Co. vs. Mobile Mut. Life Ins. Co.*, 351.

5. **IN CASE OF POLICY OF BENEVOLENT SOCIETY PAYABLE TO ANOTHER—ULTRA VIRES.**—A policy taken out by a beneficiary on the life of another in whom he has no interest is a wagering-policy and void. But this doctrine does not apply where a party takes out a policy on his own life and pays the premiums, making it payable to another. This the law permits.

Where the charter of a benefit-association states its purpose to be to furnish pecuniary benefits to devisees of members, a member may make the policy payable to a stranger in the first instance as well as by devise.

Where the company has accepted the premiums, and the conditions have been performed, it cannot set up the doctrine of ultra vires to defeat a claim on the ground that the beneficiary was not a devisee as required by the charter. *Bloomington Mut. Life Ben. Ass'n vs. Blue*, 486.

6. **WAGER-POLICY IN CASE OF CREDITOR.**—G. was indebted to his brother-in-law, K., to the amount of \$743.56, and took out a policy for \$3,000 for the benefit of K., the latter paying the premiums and the transaction being in good faith.

Held, That the disproportion between the amount of the policy and the debt was not so great as to make it a wagering contract, and K. having received the amount of the policy, the administrators of G. were not entitled to recover from him the excess above the actual indebtedness.

- Held*, That a declaration by G. that he had given K. a policy on his life, and that after his death he could realize what G. had got from him, was not conclusive that the policy was intended simply as a collateral security. *Grant's Administrators vs. Kline*, 562.
7. QUESTION OF ON APPEAL.—Where one has an insurable interest in the life of a person, the amount or extent of which is not questioned upon the trial of the case, it is too late to raise such questions in the supreme court. *McArthur vs. Chase*, 691.
8. UNDER AGREEMENT TO SUPPORT.—A an old woman, was living with her daughter and B, the father of her son-in-law. B had A's life insured; his only interest being, as stated in the application, "has kept her for a certain length of time, and promises to keep her as long as she lives." After the death of A, her executor attempted to recover the amount of the policy from B, less the amounts paid by him. The court, on the trial, refused to charge the jury, as matter of law, that the insurance was speculative. *Held*, not to be error. *Baldorf vs. Fehler*, 682.
9. ABSENCE OF IN ASSIGNMENT—WAGER-CONTRACT.—A member of a benevolent order assigned his certificate payable to his wife and children, with the consent of the society, to a cousin living with him and dependent on him for employment and support. The latter paid up dues in arrears and the subsequent dues according to the agreement on which the assignment was made. The laws of the society allowed a member to make any party a beneficiary.
- Held*, That the agreement for the assignment was a wagering-contract and that the assignee had no insurable interest that would support it.
- Held*, That the certificate was payable to the original beneficiaries named therein. *Price vs. Supreme Lodge*, 847.
10. AGREEMENT TO SUPPORT—A policy, issued upon the life of A in favor of B, contained an agreement that A should not become a pauper so long as it was in force.
- Held*, That B, having otherwise no interest in the life of A, could only recover the actual amount expended for his support, on grounds of public policy. *Siegrist vs. Schmolz*, 892.

See ASSIGNMENT 6, 8; BAILEE 2; BENEVOLENT SOCIETY 11.

INSURANCE COMPANY. See BENEVOLENT SOCIETY 4; SURPLUS.

INTEREST. See WIFE'S POLICY 2;

INVENTORY.

- AS EVIDENCE OF VALUATION.—An inventory of stock was made at the time the insured purchased the business from other parties some time previous to the fire, and it appeared that a considerable part of that stock remained on hand at the time of the fire.
- Held*, That the inventory was admissible to aid in determining the value of the goods enumerated therein which constituted a part of the stock. *Ellsworth vs. Aetna Ins. Co.*, 411.

INTEMPERANCE.

- MEANING AND EVIDENCE OF.—The application, which was a warranty, provided that the applicant "is not and will not become habitually intemperate."
- Held*, That the meaning of these words was a question for the jury. The burden of proof was on the company to show habitual intemperance.
- Held*, That instructions that a single or occasional excess does not make a man a drunkard, but a habit of life of indulging frequently with violence in excessive fits of intemperance, will justify such a finding, was sufficient under the circumstances. It would not be admissible to attempt to define to the jury approximately the frequency of indulgence.

Opinions of a witness as to the effect of habits four years later, are inadmissible. Evidence of a conversation with a physician four years prior to the issue of the policy, regarding the insured's having a probable attack of delirium tremens, is inadmissible. *N. W. Mut. Life Ins. Co. vs. Muskegon Nat. Bank*, 925.

INTOXICATION.

EVIDENCE AS TO—ASSIGNMENT.—Where, in an action against a bank to recover the value of certain life-policies, which plaintiff had assigned to it on the ground that he was in a state of intoxication at the time, and did not comprehend the transaction, the statements of the plaintiff made to the company, though differing from and inconsistent with such an averment, do not operate as an estoppel against him, so as to deprive him of the right of having the question of his state of mind at the time of the assignment submitted to the jury; and when there is any evidence of intoxication at the time, the plaintiff cannot be nonsuited.

Where an action is brought to recover certain life-policies, or their value, which had been assigned by plaintiff, on the ground that he was in a state of intoxication at the time and did not comprehend the transaction, if the evidence sustains the allegation, the contract will be rescinded, and it is not necessary first to bring a suit in equity to have the assignment declared void.

The owner of a policy of insurance, issued upon the life of the assured himself, may be assigned by the assured to any other person, with the assent of the company. *Bussinger vs. Bank of Watertown*, 265.

See APPLICATION 5, 11.

JUDGMENT. See ADMINISTRATOR; BENEVOLENT SOCIETY 7; FOREIGN COMPANY 1.

JURISDICTION.

OF JUSTICE.—Section 2,584 of the Iowa code confers jurisdiction upon a justice of the peace of an action brought on a policy of insurance insuring property within his county, where the loss occurs, although the principal office or place of business of the insurance company is in another county. *Hunt vs. Farmers' Ins. Co.*, 239.

See FOREIGN COMPANY 4; GARNISHMENT; WIFE'S POLICY 1;

JURY.

REPRESENTATIONS AS TO INTEREST IN THE COMPANY.—When examined on his voir dire, a juror being asked whether he held a policy in the company, replied in the negative. It afterwards appeared that he had taken out a policy for the benefit of his wife.

Held, That the object of such an examination is to ascertain whether the juror is impartial, and it is the duty of the juror to make a full answer, not concealing any material fact.

Held, That the question required the juror to state that such a policy had been taken out, and his failure to do so was misconduct which entitled to a new trial, notwithstanding his affidavit that his verdict had been influenced solely by the law and evidence. *Pearcy vs. Michigan Mut. Life Ins. Co.*, 665.

LESSEE.

OTHER INSURANCE—ALIENATION.—The lessee, who introduced new machinery, insured it and assigned the policies to the insured as security for money loaned.

Held, That this was not double insurance.

Held, That possession by lessees with a privilege of buying, was not an alienation of title or interest by the lessor. *Planters' Mut. Ins. Co. vs. Rowland*, 345.

LIGHTNING. See CONTAINED IN; PROOFS OF LOSS.

LIMITATION.

1. REFUSAL OF PAYMENT NOT A WAIVER.—Where the statutes forbid suit to be begun on a policy within 90 days after notice of loss has been given, refusal of the company to pay and notice that it will stand suit will not enable a claimant to sue until the expiration of the statutory time. *Quinn vs. Capital City Ins. Co.*, 980.
2. WHEN IT BEGINS TO RUN.—The loss occurred on February 23d; proofs were furnished March 12th, and suit was begun September 14th, following. The policy was payable sixty days after notice and proofs received in accordance with its terms. It provided that no suit should be sustainable until an award had been obtained nor unless commenced within six months after the loss had occurred.

Held, That the limitation did not begin to run until the time when the right of action accrued by virtue of the other provisions, and the suit was not barred.—*Vette vs. Clinton F. Ins. Co.*, 598.

3. CONSTRUCTION AS TO.—The policy provided that an action to recover for a loss should be commenced within six months after the fire occurred, and also that arbitrators should be appointed to ascertain the amount of loss, and no action should be brought until they had made an award, and nothing should be due and payable under the policy until sixty days after the completion of all the requirements of the policy. *Held*, these provisions should all be construed together, and the six-months limitation be reckoned, not from the occurrence of the fire, but from the expiration of the sixty days, when the loss was due and payable. Under any other construction the insured's right of action might be barred before it had accrued.—*Friezen vs. Allemania Ins. Co.*, 513.

4. EFFECT OF WAIVER ON THE RIGHT OF ACTION.—A condition in a policy of insurance, that no suit shall be brought upon the policy unless commenced within a stipulated time, less than the period prescribed by the statute of limitations, is valid and enforceable.

A policy of insurance contained a condition that no suit should be maintained upon the policy unless brought within six months from the day upon which the loss occurred; loss occurred on August 18th, 1884, and on February 11th, 1885, when seven days of six months remained, the insurance company indorsed upon the policy the following: "The provision in this policy limiting the time within which suit may be brought against this company under it, is hereby waived for thirty days from this date;" suit was brought on March 16th, 1885, six months and twenty-six days after the loss.

Held, The effect of the company's waiver was to suspend for thirty days the provision limiting the time for suit, so that the six months' limitation ceased to run for thirty days and began to run again at the expiration of that time, when seven days of the six months remained; the suit, having been brought within those seven days, is in time.—*Va. F. & M. Ins. Co. vs. Aikin*, 138.

5. EVIDENCE AS TO.—In an action on an insurance policy, which contains a clause that any suit or action thereon should be commenced within twelve months after the loss; *Held*, that the evidence did not sustain a finding that the delay in bringing the present action was caused by the conduct of the defendant; that, after the plaintiff had been informed of the position of the defendant, he had ample time, within the year, to commence his action. *Garido vs. American Central Ins. Co.*, 151.

See MUTUAL COMPANY 1; STATUTE.

LIVE-STOCK. See CONTAINED IN; RISK 3; VALUATION 3.

LOSS. See MEASURE OF DAMAGES; TOTAL LOSS.

MEASURE OF DAMAGES. See ASSIGNMENT 5; PARTIAL LOSS; EVIDENCE 5; PROOFS OF LOSS 7; REPLACEMENT 2.

MEDICAL ATTENDANT. See APPLICATION 8, 11.

MORTGAGE.

1. NOT A CHANGE OF TITLE.—The policy also provided that "the interest of the insured is the entire, unconditional, and sole ownership of the property, and that the policy shall become void by the sale or transfer, or any change in title or possession, of the property insured, whether by legal process or judicial decree, or voluntary transfer or conveyance," etc. At the time the policy was issued there was an outstanding mortgage on the property, and the insured, after receiving the policy, executed another mortgage upon it. *Held*, neither of these mortgages was a voluntary sale, transfer, or conveyance of the property within the meaning of the policy, nor did either have the effect to vitiate the policy; especially as the insured was asked no questions as to any outstanding mortgage, and made no agreement as to future ones. *Friezen vs. Allemania F. Ins. Co.* 513.
2. MISREPRESENTATION AS TO—OTHER INSURANCE BY MORTGAGEE.—Where the application was oral, and there was no inquiry regarding incumbrances, a failure to mention the existence of a mortgage is not a misrepresentation.
- A policy-prohibition against further insurance by the insured owner will not prevent a mortgagee from independently insuring his own interest. *Guest vs. N. H. F. Ins. Co.*, 790.
3. WITHOUT NOTICE IN CASE OF RENEWAL.—A policy of fire insurance contained a clause that, if the assured should mortgage the property without notice to the company, the policy should be null and void. After the issuing of the policy, the insured mortgaged the property without notice to the company, and subsequently the insured paid the premium, and renewed the policy for another year, within which time the property was destroyed by fire, and an action was brought upon the policy and renewal. *Held*, that there was no mortgage executed contrary to the renewed policy. *Lebanon Mut. Ins. Co. vs. Leathers*, 977.

See MORTGAGEE; USURY.

MORTGAGEE.

1. NON-PAYMENT OF PREMIUM—DEFECTIVE CANCELLATION.—The policy was procured by N. on credit for the premium and made payable to J. as mortgagee. J. subsequently became owner and the policy was confirmed to him and made payable to C. as mortgagee. Notice was afterwards sent to J. and to C. that, unless the premium was paid on the following day, the policy would be canceled. No payment being made, they were notified on the following day (Saturday), that the policy was canceled, and its return with the earned premium was demanded. The notices were received on Monday following, and about three hours later the loss occurred.
- Held*, That the obligation to pay the premium rested on N., whose undertaking to do so had been accepted by the company, and who had not been notified, and C. had no knowledge of such failure to notify, therefore C. was not guilty of fraud or default.
- Held*, That the cancellation would only be effective upon the lapse of a reasonable time after notice, to procure other insurance.
- Held*, That in order to make the cancellation complete, the company should have surrendered the obligation of N. given for the premium. *Chadbourne vs. German-American Ins. Co.*, 897.

2. REFORMATION IN CASE OF POLICY ERRONEOUSLY MADE TO MORTGAGOR.—Where the insurance was procured by the mortgagee on his own interest and the policy, by mistake, was made in the name of the mortgagor, this error will not be allowed to defeat it, but equity will reform the contract, and direct the payment of the insurance-money to the mortgagee. *Fink vs. Queen Ins. Co.*, 314.

See ACTION 1, 2; INCUMBRANCE; INSURABLE INTEREST 3; OTHER INSURANCE 5.

MUTUAL COMPANY.

1. BY-LAW AS TO LIMITATION.—Where the by-law of a mutual company was pleaded to the effect that suit must be brought by the insured within six months if notified that the company declined to arbitrate or pay the loss. *Held*, On demurrer that the plea was bad unless it alleged that the by-law antedated the making of the contract. *Cox vs. Farmers Mut. F. Assn.*, 149.
2. AMENDMENT TO CHARTER OF STOCK COMPANY WILL NOT CONSTITUTE.—A company was organized under the laws of another State as a stock company, but by a subsequent amendment was authorized to receive subscriptions, payable in cash, and to give therefor interest-bearing receipts setting forth that they are given for premiums in advance, and are liable for losses and expenses, which receipts were to be receivable only in payment of premiums, and the company was authorized to commence business when the cash subscriptions had reached a certain sum. *Held*, That it could not be considered a mutual company within the meaning of the Illinois law, where the subscribers are not required to insure at any time and thus cancel the receipts, and is not entitled to a license to do business as such in that State. *Mutual F. Ins. Co. vs. Swigert*, 437.
3. EVIDENCE AND AMOUNT OF ASSESSMENT—FRAUD—PROOF OF CLAIM.—When the charter of a mutual insurance company provides that, in an action for the recovery of assessments, the certificate of the secretary shall be prima facie evidence of the assessment and amount due, the burden is on the defendant to show that the assessment is invalid for fraud or gross mistake. In the absence of such provision in the charter or in the statute relating to such companies, the company is bound to prove the facts establishing the claim.
- In fixing the amounts to be assessed upon the members for losses incurred by a mutual insurance company, a reasonable amount may be included for expenses and insolvency of members. If the plaintiff in an action to recover an assessment proves its claim without showing so large an excess in the assessment as in itself satisfies the jury of fraud or gross mistake, it is entitled to recover. The burden of showing fraud or misconduct is on the defendant when he relies on that as a defense.
- Where the defendant files an affidavit under the Pennsylvania act of May 1, 1876, § 56 (P. L. 53), the plaintiff is bound to prove its claim as if the statutory provision relative to the certificate had not been enacted.
- By-laws of a mutual insurance company are part of the contract of insurance, and the directors have no right to make an assessment on any basis other than there set out. *Susquehanna Mut. Ins. F. Co. vs. Gackenbach*, 557.

See ASSESSMENT 1; INSOLVENCY 1; SURPLUS; TAXATION 3; VACANT 2.

NEGLIGENCE.

- TITLE TO INSURANCE MONEY—TOTAL LOSS—BURDEN OF PROOF—EVIDENCE.—The libelants issued a running policy to H. M. & Co., "on account of H. M. & Co., for whom it may concern." They subsequently, upon the application of H. M. & Co., issued a certificate of insurance under and subject to the conditions of the said policy; loss, if any, payable to the assured, or order. H. M. & Co., by whom the insurance was effected, were intermediaries between boatmen and shippers. A., P. & Co. were the owners of the cargo. The certificate by which the cargo was insured, under and subject

to the conditions of the running policy, was obtained by H. M. & Co. at the request of A., P. & Co. The libelants' dealings were entirely with H. M. & Co. In consequence of negligence on the part of the carrier, a total loss ensued. The libelants, upon an abandonment by A., P. & Co. and H. M. & Co. of their interests in the property, paid the insurance in full, and filed a libel against the carrier for negligence. *Held*, that the certificate and policy are to be read together; and when so read, constitute a contract to insure H. M. & Co. for themselves, and for those whom they might represent, having insurable interests in the premises, and that both H. M. & Co. and A., P. & Co. were embraced therein. The intention of the person who effects the insurance, whether known to the insurer or not, determines the application of the clause.

Payment of a total loss works an equitable assignment of the property, and the insurer may, after payment to the assured, charge the carrier for negligence in destroying property which has become his. The insurer, upon subrogation to the rights of the assured, becomes the real party in interest, and may maintain the suit in his own name.

When a loss occurs in consequence of an explosion of the boiler, a presumption of negligence on the part of the carrier is thereby created, which those who are responsible must rebut by proof of due care, or by showing the existence of circumstances over which they had no control, and to which the result may be fairly attributable.

Although the answer denies negligence, it admits facts which raise a presumption of negligence, but as the apostles indicate that the question of negligence has not been fully entered into, and as the claimant has relied upon the theory that the facts found did not make out a prima facie case against him, he may be permitted to apply for leave to introduce further evidence in this regard. *Providence-Washington Ins. Co. vs. The Sidney*, 254.

See AGENT 17.

NOTICE.

WAIVER BY AGENT.—A stipulation in a fire insurance policy, that immediate written notice of loss shall be given to the company, may be waived by an agent who has full authority to adjust the loss, although the policy provides that the company shall not be bound by the acts or declarations of its agents not contained in the policy. *Sterens vs. Citizens' Ins. Co.*, 112.

See PROOFS OF LOSS; STATUTE.

NON-FORFEITURE.

1. **DISHONORED ORDER FOR PREMIUM.**—The policy provided that it should be incontestable except for fraud on certain conditions, which were complied with. The insured gave an order for part-payment of premium, which was not honored. The order stipulated that if not paid all rights of the insured in the policy should be forfeited.

Held, That, as to the beneficiary, no forfeiture could be enforced. The policy provided that the binding receipt, when its number has been inserted in the policy, shall be conclusive evidence of payment of premium, and when such an instrument with the number inserted is placed in the hands of the beneficiary, the company will be estopped to assert as to her the non-payment of premium. *Kline vs. Nat. Ben. Ass'n*, 769.

2. **CONSTRUCTION OF LAW—RIGHTS OF BENEFICIARY.**—An act of the legislature provided that, upon the payment of the first premium upon a policy of life insurance, the policy should remain in force for a certain time for the full amount thereof, "anything in the policy to the contrary notwithstanding."

Held, That this act might be waived by the express agreement of the parties, by the substitution of a non-forfeitable policy of a different character.

The beneficiary of a policy is bound by all the terms of the original contract entered into between the insured and the company. *Caffery vs. John Hancock Mut. Life Ins. Co.*, 287.

OCCUPANCY. See VACANT.

OTHER INSURANCE.

1. NOTICE TO AGENT NOT SUFFICIENT WHEN—WAIVER BY ADJUSTER.—A condition of the policy required that notice of other insurance should be given to the company, and indorsed on the policy or otherwise acknowledged in writing.

Held, That the notice must be given to the company itself through its managing officers at its head office; notice to a local agent, though given in writing where no indorsement had been made upon the policy was not sufficient.

Held, That the fact of the other insurance having been effected through the same agent, would not amount to constructive knowledge by the company or a waiver of the condition where actual knowledge had not been brought to the company.

Held, That an average-adjuster, employed to adjust the loss, had no power to waive a breach of the policy-provision regarding other insurance.

Held, That a mere investigation by such adjuster regarding the amount of loss and consequent liability without more, would not amount to a waiver of the condition, even had he been authorized to waive such condition. *Western Ass'n Co. vs. Doull*, 984.

2. MINGLING OF GOODS.—It is no defense to an action brought upon a policy of fire insurance containing the usual clause against insurance in other companies without consent, that the plaintiff did insure in other companies if the different policies do not legally cover the same property, although there may be some mingling of the goods. *Boatman's F. & M. Ins. Co. vs. Hocking*, 961.

3. AGREEMENT WITH AGENT AS AN ESTOPPEL—ENTIRE OR SEPARABLE CONTRACT.—The policy provided that it should be void in case of other insurance without consent indorsed, and that nothing less than a specific agreement clearly expressed and indorsed on the policy should be a waiver of its printed conditions.

Held, That an agreement with the authorized agent at the time of insuring that other existing insurance should be permitted, will estop the company from alleging that such consent was not actually indorsed. But a mere agreement subsequent to the issue of the policy that other insurance might be taken out, where it does not appear that the company had any knowledge that it was taken out, and no request for its indorsement is made, will not operate as an estoppel.

Where the policy is on the building and contents, the amounts on each being apportioned, it is an entire contract, and if avoided as to the building by other insurance thereon without consent, it is also void as to the contents. *Havens vs. Home Ins. Co.*, 713.

4. KNOWLEDGE OF AGENT.—The policy provided that it should be void, unless consent were obtained in writing, in case "the insured should have or shall hereafter obtain any policy or agreement for insurance, whether valid or not."

Held, That the policy was avoided by taking out another which was obtained and shown to the agent, without objection by the latter, after failing to negotiate with him for the additional insurance at a satisfactory rate. *Robinson vs. Fire Association of Philadelphia*, 65.

5. WHEN VOID.—The terms of an insurance policy on a building and machinery therein provided that it should become void if any other insurance policy, whether valid or not, was obtained on the same property. Another policy had been taken out previously, which stipulated to be void

if the property were sold or mortgaged, if any change took place in the title, or any portion of it were removed to another location without the company's consent. Subsequently this policy was rendered void by the fact that the property was sold and mortgaged to secure the purchase-price; also the machinery was removed, without the required consent, from the building in which it was when the policy was issued. *Held*, that the first-mentioned policy was not defeated by the existence of the other, since the latter had ceased to be a binding contract of insurance before the former was issued. *Stevens vs. Citizens' Ins. Co.*, 112.

See AGENT 2, 13; LESSEE; MORTGAGE 2.

OVER-INSURANCE.

OF CARGO BY CAPTAIN—FRAUD.—An over-insurance of the cargo is not a breach of warranty by the owner of the vessel not to insure his interest in the vessel beyond a certain amount.

An over-insurance of cargo, growing out of insurance by a banking firm to protect them as acceptors of drafts drawn by the captain on them to meet disbursements in the purchase of timber, which composed the cargo, does not tend to establish that the loss of the vessel was fraudulent. *Merchants' Mut. Ins. Co. vs. Allen*, 453.

PAROL CONTRACT. See REFORMATION 1, CONTRACT.

PARTIAL LOSS. See COLLISION.

PARTNER.

1. **TRANSFER OF PART-INTEREST A SALE.**—The policy provided that if the assured sell or transfer the property it should be void. The insured subsequently transferred to a firm consisting of himself and a partner.

Held, that the insured did not part with his insurable interest by the transfer so as to avoid the policy irrespective of conditions in that instrument, but there had been a sale which worked a forfeiture within the provision. *Blackwell vs. Miami Valley Ins. Co.*, 699.

2. **EFFECT OF NEW MEMBER IN CASE OF RENEWAL—PROOFS OF LOSS.**—A firm consisting of two members insured their stock against fire, and subsequently introduced another member, but without changing the name of the firm. The policy was under seal, and provided "that this insurance shall continue and be in force . . . so long as the said assured, or their assigns, shall continue to pay the like premium as hath been paid for this insurance; . . . provided, that a premium for a continuance of the insurance shall be actually paid by the assured, or their assigns. . . . and . . . a receipt therefor given by this corporation." Renewal premiums were duly paid by the firm, and renewal receipts taken therefor, until April, 1836, when a fire occurred.

Held, That the covenant in the policy contemplated the continuance or extension of the contract of insurance from year to year as a specialty, and the payment of the yearly premiums so continued it. The incoming member of the firm, not being a party of the deed, could not be joined as a plaintiff in the action, nor could assumpsit be maintained by the original firm for the loss sustained.

The same firm held another policy from the same company, obtained under similar circumstances, which policy did not contain a covenant for continuance or extension, but expressly declared that it should only continue for one year.

Held, That the policy, as a specialty, did not admit of an extension, but that the renewal receipts constituted distinct parol contracts referring to and incorporating the terms of the original policy. The absence of notice to the insurance company of the change in the firm did not affect the

validity of the last of such contracts, which must be held to have been made with all the partners, and enforceable by them in an action of assumpsit.

By one of the conditions in the policies, the parties insured were required to render to the company within a reasonable time, "a full and particular account of their loss, to be signed by their own hands, and verified by their oath and affirmation." Only one of the parties signed and verified the particulars. The company did not object to the sufficiency of the particulars until after action brought, and in the first instance based their refusal to pay upon other grounds.

Held, That they had waived any objection to the sufficiency of the particulars. *President & Directors vs. Floss*, 831.

See PROOFS OF LOSS 10.

PETROLEUM. See STORING.

PLEADING.

1. **SUFFICIENCY OF DECLARATION—POLICY IN ANOTHER NAME—EXCESSIVE VALUATION.**—A declaration in assumpsit on a policy of insurance, not intended to be drawn after the form prescribed by ch. 66 of the acts of 1877, is nevertheless sufficient, if it in substance and effect sets forth the cause of action, by averments equivalent to those prescribed by that statute, although it may be insufficient as a common-law declaration.

In an action upon a policy of insurance a plea that such policy was made and issued to a different person than the person named therein, although of the same name, is equivalent to the general issue, and if objected to, ought to be rejected, or if demurred to the demurrer should be sustained.

In an action of assumpsit upon a policy of insurance of \$1,500.00 against loss by fire, of a certain stock of store goods, the defendant filed a plea alleging in substance that at and before the making of the policy, the insured falsely represented to the defendant's agent who issued the policy, that the stock of store goods about to be insured was worth \$2,000.00, which was false, and then by the insured known to be false, and that the "goods" were not worth that sum; and that the insured then and there agreed, that during the continuance of the policy, he would keep in said store a stock of goods of the average value of \$2,000.00, and that he did not keep up his average stock to the value of \$2,000.00, but permitted the same to be run down until at the time they were destroyed they did not exceed in value \$300.00. *Held*:

That such plea presents no good ground of defense, and having been objected to it ought to have been rejected, and having been demurred to the demurrer ought to have been sustained.

On the trial of an action upon a policy of a fire insurance company, an instruction which in effect tells the jury, that if the company's agent employed in issuing such policy, without any misrepresentation or suppression of the truth, by word or act on the part of the person desiring to be insured, or on the part of his agent employed in negotiating such insurance—fails or neglects to ascertain the identity of the person desiring such insurance, and believes that the name of the insured is in fact the name of his agent, and that the agent of the insured and the insured are one and the same person, such company is not bound to be insured by such policy—is erroneous and is properly refused. *Travis vs. Peabody Ins. Co.*, 161.

2. **SUFFICIENCY OF REPLY—AVERMENT OF PERFORMANCE.**—A reply setting forth existence of an agency in the county in which suit is brought and service on such agent is enough to give the court in that county *prima facie* jurisdiction.

Where plaintiff avers performance of conditions regarding proofs in one paragraph and a waiver of the conditions in another, issue is completed by a general denial without the necessity of a special affirmative answer. *Indiana Ins. Co. vs. Capehart*, 53.

3. **CHARACTER IN CASE OF FRAUD.**—In an action on a fire insurance policy, counsel for plaintiffs, in his concluding argument to the jury, said that the ancestry of plaintiffs was well known to counsel, and to every one else who had lived in the community with them; that their honor, integrity, honesty, and truthfulness, and that of their descendants, had never been called in question until this soulless corporation, defendant in the case, had charged one of their descendants with falsehood, fraud, and misrepresentation. *Held*, objectionable language. *Commercial Fire Ins. Co. vs. Allen*, 641.
4. **ALLEGATION AS TO PAYMENT.**—A contract of insurance, made by a husband, provided the money should be "payable, in case of his death, to his wife, M. L., or her executors, administrators, guardians, or assigns, as directed by said member in his application, or to such other person or persons as he may subsequently direct, by will or otherwise." *Held*, that in an action on this contract by the wife, she need not allege in her complaint that the husband had not directed the money to be paid to any other person, as that is matter of defense. *Laudenschlager vs. N. W. Endowment Ass'n*, 982.

See APPLICATION 4; ARBITRATION 2; POLICY 2.

POLICY.

REFORMATION: CASE OF VARIANCE.—The plaintiff claimed that the policy he received was different from that contracted for, and sought to recover damages for refusal to deliver the policy contracted for.

Held, That the omission from the evidence of the policy actually received and the application and the lack of proof that it was not accepted, were fatal to the claim.

Held, That a written contract cannot be reformed for fraud or mistake without proof of what was fraudulently omitted or inserted. Mere oral evidence will not suffice.—*Conrow vs. American Life Ins. Co.*, 72.

2. **EXHIBIT OF POLICY IN COMPLAINT.**—It is not sufficient in the complaint to merely refer to the copy of the policy which is attached as an exhibit, to show the nature of the property insured, its location, and the term of insurance, such facts should be specifically set forth in the complaint itself. Such copy of the policy will not be looked to on demurrer to aid the sufficiency of the pleading.—*Johnson vs. Home Ins. Co.*, 208.

See AGENT 4; APPLICATION 9; CANCELLATION 2; CONSTRUCTION 2; CONTRACT; NON-FORFEITURE.

PRACTICE. See AGENT 5; INSURABLE INTEREST 7; SEAWORTHY.

PREMIUM.

1. **AGREEMENT FOR CREDIT IN CASE OF NON-PAYMENT.**—Where it appeared from the evidence that there was a mutual understanding between the company, its agent and the insured that instead of a strictly cash payment of premium at the time of effecting insurance a short credit would be given, and the policy provided that it should be void if the insured neglected to pay the premium, a failure to pay until the renewal premium was a short time overdue and a loss had occurred, did not work forfeiture.—*Lebanon Mut. Ins. Co. vs. Humes*, 679.
2. **ORDER FOR PAYMENT OUT OF WAGES.**—An accident policy was issued for the term of twelve months. An order on the employer of insured was given for the premium, payable in four monthly installments, to be deducted from wages earned in January, February, March, and April. The order was not accepted by the employer, but the first two installments were paid by the employer. During the two months following the insured earned no wages, and the installments were not paid. But during the following

month he had earned more than enough to pay them when an accident occurred. The policy provided that the installments should apply to successive periods of two, two, three, and five months each, and that there should be no liability for any period during which an installment should be unpaid. The company did not demand payment of the balance of the order, nor notify the insured that it was unpaid and the policy at an end, nor did it return to him the order.

Held, That these things were not required of the company, the policy ceased according to its terms upon non-payment. The employer could only have paid out of wages earned later at its peril.

Held, That there could be no recovery. *Banc vs. Travelers' Ins. Co.*, 749.

3. **RECOVERY BACK OF.**—Where the policy was valid in its inception and there was for a time a risk, premiums previously paid cannot as a general rule be recovered as for money had and received, on account of a refusal to receive another premium. *Continental Life Ins. Co. vs. Hauser*, 781.
4. **WAIVER BY AGENT IN CASE OF RENEWAL.**—The company was accustomed to give credit to its agent in the collection of premiums on policies issued through him, and the agent in turn was accustomed to credit the policy-holders. A policy was renewed, but the renewal premium was not paid to the agent until a few days later and after a fire. The premium was forwarded to the company by the agent but refused, the company setting up a policy-provision that it should be void in case the premium was unpaid.

Held, That the provision was waived by a mutual understanding between the parties regarding credit. *Lebanon Mut. Ins. Co. vs. Humes*, 882.

See AGENT 2, 3, 6, 8, 14; BENEVOLENT SOCIETY 3; BROKER; EVIDENCE 4; FORFEITURE; MORTGAGE 1; NON-FORFEITURE; TAXATION 3.

PREMIUM-NOTE.

1. **WAIVER OF PAYMENT.**—Where a policy contains no express stipulation that the failure to pay a note given for membership when due would render the policy void, and after a note so given becomes due the time of payment is extended by the company, and death occurs before this time of payment runs out, *held*, that no forfeiture of the certificate of membership can be declared for non-payment of the note when first due. *Kansas Prot. Union vs. Whitt*, 853.
2. **LIABILITY TO ASSESSMENT IN CASE OF INSOLVENCY.**—Where the losses of an insolvent fire insurance company are about \$50,000, and the premium-notes \$174,000, of which \$79,391.27 represents unexpired policies, an assessment "to the amount of the premium-notes, * * * less all previous assessments," is so much in excess of the amount required for the payment of losses that, in an action on a premium-note by the assignee to recover the assessment due thereon, the burden is on him to show that such assessment was reasonably proper, in view of all the circumstances, and in the absence of such proof a verdict should be directed for the policy-holder. *Lehigh Valley Fire Ins. Co. vs. Dreyfoos*, 523.
3. **INSURED AS AGENT OF THE COMPANY IN ITS PAYMENT—WAIVER.**—The insured had given a premium-note, which the agent afterward forwarded to the postmaster of the town where insured resided for collection, together with a notice that if not paid within thirty days from date the policy would be suspended. Unknown to the agent, the insured was himself the postmaster. Within thirty days of its reception, but after the expiration of thirty days from the date, the postmaster canceled the note in presence of two witnesses and placed the amount in a separate apartment in his safe with the remark that there was another note paid. The property burned on the following day, and shortly after the identical money in the safe was forwarded to and received by the agent in ignorance of the loss. The policy provided that it should not be liable while any note given for premium remained due and unpaid.

Held, That the policy-provision was valid.

Held, That the insured could not act as agent of the company in paying his own note and in waiving the policy-provision; and having concealed the fact of the loss when transmitting the money, the company was not liable. *Harle vs. Council Bluffs Ins. Co.*, 670.

See ASSESSMENT 1; CANCELLATION 1, 3; PROOFS OF DEATH; WIFE'S POLICY.

PROHIBITED RISK. See STORING.

PROOFS OF DEATH.

WAIVER OF—CANCELLATION—NON-PAYMENT OF NOTE.—After the death of a person holding a policy of insurance, and the insurance company is notified of his death by the beneficiary named in said policy, and the company refuses to pay upon the grounds that deceased was not a member of the company, and that the policy had been canceled for non-payment of a note given for membership-fee, *held*, that no formal proof was necessary, and that by denying all liability the company waived proof of death, *Kansas Prot. Union vs. Whitt*, 853.

See AGENT 11.

PROOFS OF LOSS.

1. **REPUDIATION OF LIABILITY A WAIVER.**—A policy of insurance contained the following: "Persons having a claim under this policy shall give immediate notice thereof to the company, and within ten days thereafter render a particular account and proof thereof, signed and sworn to by them, setting forth, etc." * * * "And until such proofs, as above recited, are produced, and examinations and appeals permitted, the loss shall not be payable." Upon destruction of the property, prompt notice of the loss was given to the company insuring, which replied, repudiating responsibility exclusively on collateral grounds, and declining to take the case into consideration. *Held*, that the insuring company had waived its right to proofs of loss, etc. *Lebanon Mutual Ins. Co. vs. Erb*, 47.

2. **EVIDENCE OF RIGHT OF RECOVERY—WAIVER.**—When the making of the policy, payment of premium, death notice and proofs have been averred and proved, a prima facie right of recovery is made out.

Where notice and proofs have been received and retained without objection, until the trial, any defects in them are waived.

Refusal to pay on some ground not affecting the merits, as want of proper notice, is a waiver of all other objections. *Continental Life Ins. Co. vs. Rogers*, 417.

3. **MAGISTRATE'S CERTIFICATE.**—Where the proofs required the certificate of the nearest magistrate,

Held, That the certificate of a notary is not a compliance, but its acceptance and retention without objection is a waiver of the defect. *Cayon vs. Dwelling-House Ins. Co.*, 552.

4. **WAIVER OF.**—An insurance company which receives proofs of loss when offered, refers them to its adjuster, and retains them, without objection or complaint, for five months, will be held to waive a compliance with the conditions of the policy, even though the proofs were not made within the time nor in the form required by the policy. *Commercial Union Ins. Co. vs. Hocking*, 567.

5. **WHAT IS SUFFICIENT STATEMENT.**—A statement furnished in compliance with a condition in a policy of fire insurance requiring the insured to furnish in his proofs of loss the origin of the fire, that the same was not occasioned by his fault or fraud, and that he had done nothing to violate the conditions of the policy or render the same void, is sufficient. *Howard Ins. Co. vs. Hocking*, 583.

6. **IN CASE OF LIGHTNING.**—The mere written certificate of a veterinary surgeon that the animal insured had been struck and killed by lightning, is not sufficient compliance with the Iowa statute prescribing what proofs of loss shall be necessary to sustain an action on a policy. *Welsh vs. Des Moines Ins. Co.*, 592.
7. **MEASURE OF DAMAGES.**—A marine policy provided that the insured should furnish verified proofs stating among others the nature and extent of his loss, and further provided how it should be estimated and that the loss should be payable sixty days after furnishing such proofs.
Held, That though the company might contest the propriety of the demand made or its liability at all, the measure of damages was sufficiently supplied by the contract to enable the plaintiff to swear to his claim upon filing a declaration, and to give him a right under the laws of Maryland to a judgment by default. *Orient Mut. Ins. Co. vs. Andrews*, 634.
8. **WAIVER OF.**—An offer by an insurance company to pay the loss, except upon certain things claimed not to be covered by the policy, is a waiver of proofs of loss, and gives the insured the right to sue at once, without waiting for the lapse of sixty days provided in the policy. *Commercial F. Ins. Co. Allen*, 641.
9. **WHAT CONSTITUTES FRAUD IN CASE OF VALUED-POLICY LAW—TOTAL LOSS.**—The policy of a fire insurance company contained the following clause: "All fraud or attempt to defraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy." *Held*, charging jury in suit on policy, that it is incumbent on the defendant, under this clause, to show that the insured, knowingly and intentionally, swore falsely to the proofs of loss in some material respect pertaining to the extent of the loss, in order to maintain the defense of fraud.
 In such case, however, a serious discrepancy between the true value of the property and that sworn to in the proofs of loss, or between the quantity of any kind of personal property actually destroyed and that stated in the proofs, would be evidence bearing upon the issue of fraud, and a fact to be considered by the jury in determining whether there was fraud or false swearing, within the meaning of the policy, in the proofs.
 Rev. St. Wis., 1878, § 1,943, provides that "wherever any policy of insurance shall be written to insure any real property, and the property insured shall be wholly destroyed without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and measure of damages when destroyed." *Held*, that the expression "wholly destroyed," in this statute, is equivalent to "total loss," and that "total loss," as applicable to a building, does not mean that the materials of which it is composed are all utterly destroyed or obliterated, but that the building, though some part of it may remain standing, has lost its identity and specific character as a building, and has become a broken mass, so that it cannot any longer be properly designated as a building.
 Under this statute a fraudulent overestimate in the proofs of loss as to the value of real property would not work a forfeiture, although the policy of insurance expressly provided that such representation should have that effect.
 In such case, however, fraudulent representations as to the value and quantity of the personal property covered by the same policy of insurance will work a forfeiture as to the whole policy, and defeat the right of the insured to recover anything whatsoever upon the real property included in such policy.
 In such case, moreover, fraudulent representations as to the value of the real property may be taken into consideration by the jury in determining whether the statements made as to the quantity and value of personal property destroyed were or were not fraudulent, where such statements were not in fact correct. *Oshkosh Co. vs. Merc. Ins. Co.*, 801.

10. **IN CASE OF PARTNERSHIP—EXAMINATION—OBJECTIONS TO—EVIDENCE OF VALUE.**—In case of partnership insurance it is sufficient compliance that the proofs are signed and sworn to by one of the partners.
- In the absence of any showing to the contrary, a submission of the insured to examination is sufficient compliance with a policy-requirement to that effect, though it may not have been satisfactory.
- An objection that the proof was deficient in form and substance, without specifically showing in what respects, is too general.
- When the application stated the value of stock to be \$4,000, and further that "stock will be from \$4,000 to \$5,000," parol evidence is admissible to show that the intention of the insured to increase the amount then on hand of \$1,700 to those figures was explained to the agent and was the meaning of the application. *Myers vs. Council Bluffs Ins. Co.*, 885.
11. **WAIVER OF.**—Refusal to pay a loss on the ground of non-payment of premium is a waiver of proofs. *Boyd vs. Cedar Rapids Ins. Co.*, 219.
12. **WAIVER BY AGENT.**—Where a policy of insurance contained a provision that, when a loss occurred under it, "the assured should forthwith give notice in writing of said loss to the company, and within thirty days thereafter render a particular account and proof thereof," which was made a part of the contract, a local agent who is simply authorized to fix rates of insurance and countersign and deliver policies, subject to the approval of the company, has no authority to waive such provision of the policy. *Bowlin vs. Hekla F. Ins. Co.*, 305.

See ACTION 3; ADJUSTER; AGENT 3, 14, 16; ARBITRATION 2; ASSIGNMENT 5; EVIDENCE 5; PARTNER 2; PLEADING 2; TITLE 2.

RATE. See AGENT 7; EVIDENCE 4; RISK 1.

RECEIVER.

- CONTROL OF ASSETS OF INSOLVENT COMPANY IN ANOTHER STATE.**—A receiver was appointed for an insolvent Connecticut life company, by a Connecticut court under the statutes of that State. Subsequently a receiver was appointed by an Iowa court for property situated in that State at the instance of Iowa policy-holders and in their interest.
- Held*, That all the policy-holders, by virtue of their membership, were bound by the Connecticut statute, and the receiver appointed by that State had control of all the assets for the general benefit of the policy-holders.
- Held*, That the policy-holders of another State could not claim superior rights to property situated in that State. *Parsons vs. Charter Oak Life Ins. Co.*, 812.

See DIRECTOR.

RECIPROCAL LAW. See TAXATION.

REFORMATION.

1. **ALLEGED ORAL AGREEMENT.**—It was claimed that an oral agreement was made with the agent at the time of making the application, that the policy should allow the premises to be vacant for thirty days.
- Held*, in an action to reform the contract, that if the evidence is so conflicting or undecisive as to leave a doubt, the written contract must stand. *Harrison vs. Hartford F. Ins. Co.*, 787.
2. **IN CASE OF VARIANCE OF RENEWAL.**—Upon the termination of the policy the parties agreed for a renewal of the contract upon the terms and conditions of the expiring policy. The new policy contained the co-insurance clause, which was not in the first policy, but its presence was not discovered by the insured until after the loss. In a suit for reformation of the contract:

Held, That the insured was not guilty of such laches in failing to read the policy until after the loss as would debar him from the right to a reformation of the contract.

Held, That the variation from the original policy could only be attributed to fraud or mistake, and the insured was entitled to have the renewal policy reformed to correspond with the original. *Palmer vs. Hartford F. Ins. Co.*, 241.

See MORTGAGE 2; POLICY 1.

RENEWAL.

1. EVIDENCE OF ACTS OF AGENT.—It was alleged in the petition that a previous policy on the property was issued and twice renewed by the agent, who agreed with the claimant that he would keep it renewed from year to year, that the claimant should have time to pay the premiums of his convenience, that the agent informed him that the policy sued on had been renewed, and would not be affected if renewal certificates were not delivered prior to a loss. The answer set up that no renewal contract had been made, that no premium was paid, without which the policy stipulated that it could not be renewed, and that the agent informed the claimant that he was not authorized to renew without payment of premium.

Held, That the burden of proof was on the claimant and the question was for the jury. *Giddings vs. Phoenix Ins. Co.*, 510.

2. EXECUTORY CONTRACT WITH AGENT. — EVIDENCE.—The insured had been in the habit of insuring in several companies for short periods, and renewing from time to time as occasion required on tobacco in a stemmer, which was shipped as fast as prepared. Some of the policies having expired, the agent was informed according to the insured that insurance to the amount of \$12,000 on the stock was wanted, and that if the insurance remaining did not equal that sum, it was to be made up by renewals or new policies; that the insured did not know how much insurance remained, and that the agent upon examining his books reported a certain amount in force, and subsequently brought additional policies for the balance, and that it was agreed that the agent should select the companies, but that it proved that part of the insurance reported in force had expired.

Held, That there was no contract with the agent for a renewal of the policies erroneously supposed to be in force, and the companies were not liable.

Held, That to establish such an executory contract, it must appear that the agreement was complete, and nothing left for future determination. The burden of proof is on the party claiming such a contract. *Johnson vs. Conn. F. Ins. Co.*, 369.

See AGENT 6; FORFEITURE; MORTGAGE 3; PARTNER 2; PREMIUM 4; REFORMATION 2.

REPAIRS. See REPLACEMENT.

REPLACEMENT.

1. ESTIMATE OF DEPRECIATION—EVIDENCE.—The policy provided that in case of depreciation of the property a suitable deduction from the cash cost of replacement should be made to ascertain the cash value.

Held, That the age of a building was not an essential element in judging of depreciation, the ultimate question was, its condition just before the fire as compared with a new building.

Held, That in the absence of evidence as to such depreciation on the part of the company, testimony as to probable depreciation before the issue of the policy was harmless error. *Hegard vs. California Ins. Co.*, 868.

2. AS MEASURE OF DAMAGES AND AS A DEFENSE.—Under a fire-policy giving the insurer the right "to repair, rebuild, or replace any property lost or dam-

aged with other of like kind and quality," making repairs is not a full defense to an action, unless by the repairs, the property is made as serviceable and valuable as it was before the burning.

Under a policy providing that the cash value of the property destroyed or damaged shall not exceed what would be the cost to the assured of replacing it, and, in case of depreciation from use or otherwise, a suitable deduction to be made from the cash cost of repairing, the measure of damages is the cost of repairs, if by repairs the property will be made as valuable as before, and not more so; but if by repairs the property will be made more valuable than before, or less so, then a corresponding deduction from, or addition to, the cash cost of repairing must be made. *Commercial F. Ins. Co. vs. Allen*, 641.

3. A DEFENSE AGAINST GARNISHMENT.—When a company in accordance with the policy-terms gives notice of election to replace, it is no longer under obligation to pay a money-damage if it performs its undertaking. Such an answer, if true, is sufficient in proceedings for garnishment to discharge the garnishee. *Hurst vs. Home Protection F. Ins. Co.*, 688.

REPRESENTATION. See APPLICATION 6; EVIDENCE 2; TITLE 8; WARRANTY.

RISK.

1. ALTERATION AS AN INCREASE OF —NOTICE TO AGENT—RATES AS EVIDENCE.—The policy on a flour-mill provided that it should be void if the property be so altered or appropriated or used as would increase the risk according to the annexed schedule, without the company's consent indorsed.

Held, That an alteration which would increase the hazard according to the schedule would ipso facto forfeit, but an alteration of the machinery from the burr process to the roller process, not being referred to in the schedule, would not come within the provision.

There was an indorsement on the back of the policy, that in case of proposed alteration to the property application should be made to the secretary or agent, who on examination should certify whether the risk would be increased.

Held, That when no reference is made to such indorsement in the policy, it would be merely directory and not obligatory, being no part of the contract, especially where no provision for forfeiture in case of violation is made.

The by-laws required notice to be given to the secretary in case the property was rendered more hazardous, and that the directors might elect to continue upon the same or higher terms or to cancel.

Held, That verbal notice to the general agent, who stated that it was all right and that the company had decided that such a change was no increase, was sufficient.

Rates of insurance are evidence for a jury as to increase of risk, though not a decisive test. *Planters' Mut. Ins. Co. vs. Rowland*, 345.

2. WHEAT PROPERTY COVERED.—A fire insurance policy insuring a building, but expressed not to cover "fences and other yard-fixtures, sidewalks, store furniture and fixtures, *held* to cover a wooden awning in front of the building, but not shelving in the building, or an office boarded off at one end of the interior. *Commercial F. Ins. Co. vs. Allen*, 641.

3. ABUSE OF ANIMAL.—One O'Neill insured a mare for the sum of \$100 in the Western Horse & Cattle Insurance Company, and afterwards violently beat and abused said mare by striking her with an iron rod. *Held*, that a preponderance of the testimony clearly established the fact that the death of said mare was the result of such striking and abuse, and that O'Neill was not entitled to recover the amount of the insurance for the death of said mare. *Western Horse & Cattle Ins. Co. vs. O'Neill*, 509.

See AGENT 7; VOYAGE 1, 2; TORING.

SALE. See ALIENATION ; TITLE.

SEAWORTHY.

REVIEW OF EVIDENCE.—Where an ultimate fact is found by the lower court, its finding or refusal to find as to any incidental fact, which is merely evidence of the ultimate fact, will not be reviewed by the United States Supreme Court. Where, therefore, the lower court found that a vessel was seaworthy, its refusal to find that, prior to her last voyage, she was run aground and became so leaky that in the storm that wrecked her when she was thrown on beam-ends, she could not right herself and that she leaked four inches an hour, and the leak could have been discovered only by putting her in a dry-dock, which was not done, will not be investigated by the United States Supreme Court. *Merchants' Mut. Ins. Co. vs. Allen*, 453.

SERVICE. See FOREIGN COMPANY 3, 4.

SHERIFF. See TITLE 1.

SICKNESS. See APPLICATION 8 ; HEALTH.

STATUTE.

EFFECT OF REGARDING NOTICE AND LIMITATION.—Under a statute forbidding provisions requiring notice to be given in less than five days, a notice within a reasonable time thereafter is sufficient unless the time be limited in the policy, and it is for the court to say what in law is a reasonable notice and to so instruct the jury in case of disputed facts. Under such a statute a provision requiring immediate notice is void.

Where the statute provides that any stipulation by a foreign company limiting the right to sue to less than three years after a loss, shall be void, a limitation-clause restricted to one year in the policy is void. *Ins. Co. of N. A. vs. Brim*, 720.

See CAPITAL.

STORAGE. See BAILEE.

STORING AND KEEPING.

CONSTRUCTION IN CASE OF PETROLEUM.—A policy of fire insurance contained a condition that it would become void if in the premises there should be kept petroleum without written permission. From the time of making the policy until the fire the plaintiff kept a barrel of petroleum in a shed outside of, but adjoining the building destroyed, within five or six feet of the boiler, using the same as fuel for generating steam. There was no proof that the fire arose from the storage of the petroleum.

Held, That it was in habitual use, and was not an article of such vital necessity in the plaintiff's business that it could be ignored as a matter not subject to the conditions of the policy, he could not recover. *White vs. Western Ass'n Co.*, 233.

SUBROGATION.

IN CASE OF MONEY ADVANCED FOR VOYAGE BY AGENT.—The agents of the owners of a vessel advanced, at the owners' request and for their benefit, the money necessary to enable the vessel to make a voyage, and took out a policy of insurance to secure the amount advanced. The vessel was lost, and the insurance-money collected by the agents. *Held*, that the receipt of the money extinguished and satisfied the debt, and that neither under an assignment to the insurance company, nor under the doctrine of subrogation, could the company maintain an action against the owners to recover the amount from them. *Phoenix Ins. Co. vs. Chadbourne*, 834.

See INSURABLE INTEREST 3 ; NEGLIGENCE.

SUICIDE.

1. **SANE OR INSANE—EVIDENCE—ACCIDENT.**—The policy provided that it should be void if the insured died by his own hand, sane or insane.

Held, That unless the act was involuntary or the insured unconscious, his suicide while insane was not covered by the policy.

Evidence that the mental condition of the insured was such that he could not control his acts, based on observations previous to the suicide, is not evidence that the act was involuntary.

Such death cannot be deemed accidental within the policy because the insanity itself was the result of accident. *Streeter vs. Western Union Mut. Life Acc. Soc.*, 575.

2. **WHILE INSANE IN CASE OF ACCIDENT POLICY.**—The policy insured against "bodily injuries effect through external, accidental, and violent means within the intent and meaning of the contract and the conditions hereunto annexed." Among the conditions it was provided that "this insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by suicide or self-inflicted injuries.

Held, That death resulting from hanging one's self while insane was not chargeable to bodily infirmities or disease or suicide or self-inflicted injuries, and the policy was liable. *Accident Ins. Co of N. A. vs. Crandal*, 357.

See APPLICATION.

SURETY. See AGENT.

SURPLUS.

DISTRIBUTION OF.—Where an insurance company is conducted upon the stock and mutual basis, the two departments being entirely distinct, the surplus earnings accumulated from the stock department should be distributed among the share-holders of the fund of that department, according to their several shares on winding it up. *Traders & Mechanics' Ins. Co. vs. Brown*, 40.

SURRENDER. See TITLE 10, 13.

TAXATION.

1. **CONSTRUCTION OF RETALIATORY LAW.**—A Pennsylvania company authorized to do business in New York, and complying from year to year with the requirements of that State, was, under a law subsequently passed, called on to pay reciprocal taxes such as were imposed by Pennsylvania on companies incorporated in New York, which were in excess of those imposed on corporations of other States.

Held, That the corporation was not a person within the meaning of the fourteenth constitutional amendment, which provided that no State should deny to any person within its jurisdiction the equal protection of its laws.

Held, That the State might impose such conditions as it chose as a prerequisite for doing business, subject only to such limitations on the sovereignty as may be found in the fundamental laws of the Union.

Held, That the State had power to change its requirements from year to year, and compliance with such requirements only entitled the company to the privilege of admission during the term. By going into the State it assented to such prerequisites as the State might from time to time impose. It could not be of right within the jurisdiction until it had received the consent of the State under the new provisions which exacted compliance with the reciprocal law. *Fire Association vs. People*, 91.

2. **OF AGENCY OF FOREIGN COMPANY.—FOR VALUATION OF POLICIES.**—Section 2,745 of the Revised Statutes, which provides that every agency of an insurance company organized out of this State shall return to the auditor of the county where such agency is located, in the month of May annually, the amount of gross receipts of such agency, which shall be entered upon the tax-list and be subject to the same rate of taxation as other personal property, prescribes the rate of taxation upon every foreign insurance company doing business in this State. Section 282 of the Revised Statutes, which provides that when, by the laws of any other State, any taxes are imposed on insurance companies of this State doing business in such State, the same obligations shall be imposed upon all insurance companies of such other State doing business in this State, is operative only when it is shown that the law of the State where such company is organized, taxes Ohio companies doing business there at a rate higher than foreign companies are taxed by the mode provided by section 2,745. And in such case the superintendent of insurance is authorized to assess and collect from such foreign company, in addition to such tax on the gross receipts, such sum as will be sufficient to make the total equal to the amount that would be realized were the rule of taxation of the State under whose laws the foreign company is organized, applied to such company's business transacted in this State, but no more.

Where a foreign insurance company has furnished to the superintendent of insurance a certificate of the valuation of its policies in force on the 31st day of December preceding, upon the lives of citizens of this State, made by the proper State officer of the State under whose law such company is organized, and such valuation is according to the standard provided in section 279 of the Revised Statutes, such superintendent is not authorized to require compensation for valuation of such policies, notwithstanding such company has paid a like charge in former years, and has furnished to such superintendent, at his request, the data from which such valuation was made. *State vs. Keimund*, 626.

3. **OF MUTUAL COMPANY.—STATUS OF PREMIUMS.**—A mutual life company incorporated in Maine, and having its principal place of business in a city in that State, is under the Maine statute taxable in such city for the personal securities in which its funds and annual income are invested.

The premiums are not personal property placed in the hands of the corporation for the future benefit of heirs or other persons within an exempting clause of the statute. They are paid absolutely as a consideration for the contract. *City of Portland vs. Union Mut. Life Ins. Co.*, 784.

TENDER.

CONDITIONAL UPON RECEIPT.—A tender conditioned upon the signing of a receipt in full, or not followed up by bringing the money into court, is not good. *Commercial Fire Ins. Co. vs. Allen*, 641.

TITLE.

1. **CHANGE OF POSSESSION THROUGH SHERIFF.**—A provision in the policy that it shall be void if any change take place in possession, whether by voluntary act or otherwise, is violated if the sheriff has possession at the time of fire, whether legally or illegally, and whether the risk be increased or not. *St. Paul F. & M. Ins. Co. vs. Archibold & Kell*, 153.
2. **IN CASE OF VENDOR AND VENDEE—ADVERSE CLAIM—WAIVER OF PROOFS.**—The property, according to the evidence, was insured by the vendor for the benefit of the vendee.

Held, That as between the vendor and vendee, the insurance-money in case of the destruction of the property represents the property itself, and in equity should be appropriated to the vendor to the extent of his interest in case of insolvency of the vendee.

Where the companies had knowledge of the claims of the vendor and stipulated in settlement with the vendee in a compromise in which they claimed that there was no legal liability, that in the event of further litigation they were not to be affected by the payment; they paid the vendor at their peril, having notice of the adverse claim.

Where all the essential elements of the policies were admitted in the answer of the companies, it was unnecessary to introduce the policies in evidence.

A refusal to pay on the ground of no title to the property is a waiver of proofs.

Where part of the purchase-money was paid by the vendee in possession, it cannot be alleged that he has no title. *Grange Mill Co. vs. Western Ins. Co.*, 129.

3. **CONTRACT OF SALE—WAIVER.**—Where a policy of insurance against fire contains a provision that, unless otherwise expressed in the policy, the assured is understood to be the sole owner in fee-simple of the land upon which the buildings insured stand, and has indorsed upon it a copy of the application, which, by a clause in the policy, is made a part thereof, showing that the assured holds only under a contract for sale, the insurance company cannot maintain in defense to a claim under the policy, that it was void, when issued, for breach of the condition as to a fee-simple ownership, but will be held to have waived such condition.

A contract for sale of lands for a price payable by installments, which contains a proviso that, in case of non-payment of an installment for 60 days after it becomes due, the whole amount unpaid on the contract shall become due and payable, and the contract be no longer binding on the obligor, and an agreement to sell the land to the purchaser, and to convey same to him upon payment of the purchase-money, amounts to a conditional sale, with an agreement to convey, and vests an equitable title in the purchaser, and cannot be held to be a mere lease. *Lamb vs. Council Bluffs Ins. Co.*, 123.

4. **NON-DELIVERY OF DEED—BUILDINGS AS REAL ESTATE.**—The insured represented in the application that he was owner in fee simple.

Held, That buildings annexed to freehold are real estate, and the representation was in effect that the title to the land was in fee.

Held, That evidence was admissible to show that the deed, though executed, had never been delivered, but was deposited for delivery conditional upon satisfactory care of his father and mother, to be determined after their death.

When the insured failed to produce a receipt given for the deed from the party holding it, it was competent for the defense to show its contents by parol. *Pangborn vs. Continental Ins. Co.*, 62.

5. **ERROR IN SHERIFF'S RETURN.**—A purchased a tannery-property at sheriff's sale; before the acknowledgment of the sheriff's deed, A sold to B; by mistake the sheriff returned that he had sold the property to C—who was the mother of B—instead of to B, as he had been requested to return; the error passed unnoticed, B taking possession and insuring the buildings; later the establishment was destroyed by fire. *Held*, the title of B was sufficient to justify his recovery in a suit against the insuring company for the amount of the insurance. *Lebanon Mutual Ins. Co. vs. Erb.*, 47.

6. **TO BUILDING ERRECTED FOR SCHOOLHOUSE.**—Evidence that A built a schoolhouse under a written contract, and, after the making of the contract, bought the land upon which the house was built, having promised to do so if the town would vote to locate it there; that it was used by the town as a schoolhouse; and that A participated in town-meetings at which it was voted to raise money for the purpose of insuring it,—is sufficient to warrant the submission to the jury of the question whether, as between A and the town, it belonged to the latter as personal property. *Batcheller vs. Commercial Union Ass'n Co.*, 363.

7. **TO ASSIGNED POLICY—APPORTIONMENT OF DAMAGES.**—The beneficial interest in a policy of insurance procured by a father on his life, for the benefit of

and payable to his minor son, vests in the son upon the delivery of the policy, and a subsequent assignment of the policy by the father as security for his own debt conveys no title. If the son joins in the assignment he may avoid it, but he must pay the assignee the premiums necessarily paid by him to keep the policy in force while it was rightfully in his possession.

Damages may be apportioned among several defendants by separate judgments, if justice will be done by such procedure. *City Savings Bank vs. Whittle*, 414.

8. TO BUILDING ON LAND OF ANOTHER—ENTIRE OR SEPARABLE CONTRACT.—The insured built on the land of another on condition that the building should go to the land-owner at the expiration of the term agreed on.

Held, That he was not absolute owner in fee of the building.

Where the policy is on building, contents, etc., each separately valued and insured for a specific sum;

Held, That the contract is entire and a breach or misrepresentation as to one item affects all. *Cuthertson vs. N. C. Home Ins. Co.*, 465.

9. CONVEYANCE TO SECURE A LOAN.—Previous to procuring the insurance, G., the owner insured, had conveyed the property to K., in order to enable the latter to procure a loan from an association of which he was a member, for the benefit of G., the intention being to reconvey, and the association, which could only loan to members, consenting to the plan. The reconveyance was not executed until after the fire. The policy provided that if the interest were other than the entire unconditional, and sole ownership for the benefit of the insured, it must be stated or the policy would be void.

Held, That the conveyance was not such as to avoid the policy and did not require to be stated. *New Orleans Ins. Co. vs. Gordon*, 496.

10. IN CASE OF SURRENDER AND SUBSTITUTED POLICY.—A policy was issued on the life of P., payable to his mother. Subsequently, without the knowledge of the latter, it was surrendered, and a new one issued indorsed as a continuation of the first policy, and entitled to all its benefits, which was made payable to the wife of P. The original policy was always in the possession of P., but his mother was told of it and furnished him part of the money to pay the first premium.

Held, That the issues involved between the two beneficiaries as to their respective rights could not be tried under a bill of interpleader which assumes that the company is a mere stakeholder, for the claims are under two separate policies by issuing which the company has exposed itself to claims under both, and is therefore a party. *National Life Ins. Co. vs. Pingrey*, 501.

11. MATERIALITY OF REPRESENTATION.—The materiality of a misrepresentation of title in an application for insurance is a question of fact for the jury. *Sweat vs. Piscataquis Ins. Co.*, 608

12. PARTY-WALL—KNOWLEDGE OF AGENT.—A party-wall agreement with an adjoining proprietor *held* not to cause a forfeiture of a fire-policy on the ground that, in consequence thereof, the insured's interest in the property was "other than the entire, unconditional, and sole ownership," especially as the agent through whom the policy was issued lived in the town where the property was situated, and must have known of its condition. *Commercial F. Ins. Co. vs. Allen*, 641.

13. OF BENEFICIARY IN CASE OF SURRENDER AND SUBSTITUTION OF POLICY.—When a party takes out a policy of insurance upon his life pursuant to an understanding with the beneficiary therein named, who pays a portion of the premium, a valid settlement is created in favor of the beneficiary, and the insured cannot afterward surrender the policy without the consent of the beneficiary.

Where, therefore, in such a case, the insured, without the consent of the beneficiary, surrenders the policy and takes out another as a continuation of

it, but in which another beneficiary is named. the beneficiary named in the first policy is entitled to the amount payable under the second upon the death of the insured.

The fact that it is an endowment policy does not change the rule. *Pingrey vs. Nat. Life Ins. Co.*, 674.

See ALIENATION; BENEVOLENT SOCIETY 2, 12, 13; INSURABLE INTEREST 1; MORTGAGE 1.

TOTAL LOSS. See NEGLIGENCE; PROOFS OF LOSS 9.

ULTRA VIRES. See INSURABLE INTEREST 5.

UNAUTHORIZED COMPANY.

LIABILITY IN CASE OF ACCIDENT INSURANCE.—A foreign company not licensed to do business in Wisconsin, but which was charged with carrying on the business of accident insurance in that State, is not liable to the penalty imposed in Rev. St. of 1878, § 1.954, upon companies failing to file annual statements. *State vs. U. S. Mut. Accident Ass'n*, 726.

See MUTUAL COMPANY 2.

USURY.

AGENT'S COMMISSION—FEES FOR FORECLOSURE.—The payment of commissions to an agent for securing a loan, independent of the company, is not usurious.

A contract in a mortgage for the payment of reasonable attorney's fees in case of foreclosure, is not usurious.—*Halderman vs. Mass. Mut. Life Ins. Co.*, 888.

VACANT.

1. WHAT IS SUFFICIENT OCCUPANCY.—A policy of insurance upon a tannery-building, with the machinery, boiler, etc., provided "This policy will not cover unoccupied buildings—unless insured as such—and if the premises insured shall be vacated without the consent of this company indorsed hereon, or if the property insured be a manufacturing establishment, or mill running in whole or in part over, or extra time, or running at night, or if the same shall cease to be operated without consent of the company indorsed hereon, this policy shall cease and determine." The property insured from the time of the insuring till its destruction by fire was occupied in part as a shoemaker shop, the occupant utilized some liquor that was left in the tannery-vats, to finish out the tanning of some damaged hides he had found there, and also to tan some new hides he had purchased, and using every week more or less the finishing-room to complete this work of tanning. *Held*, that the establishment was both sufficiently occupied and in operation to prevent a determining of the policy because of non-occupancy or non-operation. *Lebanon Mutual Ins. Co. vs. Erb*, 47.

2. BY-LAWS OF MUTUAL COMPANY.—Every policy-holder in a mutual company is presumed to know the by-laws and conditions of insurance, and where such by-laws provide that the policy shall be void in case of vacancy, the policy is avoided in the hands of an assignee, even though it contains no provision of the kind annexed to it, and the assignment was approved by the secretary. Such assignee, after holding the contract for twenty-one months cannot claim the position of an innocent holder who was misled. *Miller vs. Hillsborough Fire Ass'n*, 799.

3. WHEN TEMPORARY.—The clause in a policy of fire insurance that, if the premises "shall cease to be operated without the consent of the company indorsed hereon, this policy shall cease and determine," is not violated by a mere temporary suspension of the business of the establishment for the purpose of repairing, or from want of a supply of materials. *Lebanon Mut. Ins. Co. vs. Leathers*, 977.

4. **MISSTATEMENT BY AGENT—SUBSEQUENT OCCUPANCY.**—Where a finding of facts by a referee is sustained by the general term of the Supreme Court of New York, it is conclusive.

Misstatements made by the agent who filled the application as to vacancy, when correctly informed by the insured, will not work a forfeiture, where the agent acted within the scope of his authority, although the statements were made warranties.

A house was insured as unoccupied, but was afterward occupied temporarily and again vacated.

Held, That the subsequent vacancy did not work a forfeiture under a policy-provision against vacancy without notice. There was no obligation imposed on the insured as to occupancy under such a contract. *Bennett vs. Agricultural Ins. Co.*, 971.

VALUATION.

1. **SUBMISSION TO JURY—WAIVER.**—In an action to recover on a fire insurance policy which contained a provision avoiding the policy for false representation or overvaluation, it is reversible error in the court, in submitting to the jury the question of an overvaluation, with direction to find for or against the plaintiff accordingly, to submit at the same time the question as to whether or not the forfeiture under this provision had been waived. *Briggs vs. Fireman's Fund Ins. Co.*, 471.

2. **EVIDENCE AS TO.**—The evidence of a witness of admissions by the plaintiff that the value of the property was much less than the amount of loss claimed is material, and when due diligence has been used, the absence of such a witness will justify a continuance. *Parks vs. Council Bluffs Ins. Co.*, 147.

3. **EVIDENCE OF IN CASE OF LIVE-STOCK—WAIVER OF ARBITRATION.**—Evidence was offered that an animal lost, if of a kind stated, was worth \$800, but under certain stated conditions the value would be destroyed.

Held, That a verdict based on such hypothetical testimony will not be disturbed if no other evidence of value is given.

The policy provided that if upon investigation the claim for loss proved correct it would be paid in a specified time; also that no animal should be insured for more than three-fourths of its value, and if found insured for more, only three-fourths should be paid, and in case of dispute the value to be determined by arbitration.

Held, That a denial of the validity of the policy was a waiver of arbitration. *Western Horse & Cattle Ins. Co. vs. Putnam*, 198.

4. **EVIDENCE AS TO.**—The rejection of evidence as to value from one not showing any competent knowledge on the subject is not error. *Guest vs. N. H. Fire Ins. Co.*, 790.

See ACTION 2; INVENTORY; PLEADING 1; PROOFS OF LOSS 9, 10; REPLACEMENT 1; TAXATION 2; VALUED-POLICY LAW.

VALUED-POLICY LAW.

INTENTIONAL OVERVALUATION NOT FRAUD.—A jury found that the insured knowingly and intentionally overstated the amount of loss in his proofs, but not with intent to deceive or defraud.

Held, That such overstatement was no defense to the action, under the Wisconsin valued-policy law, which allows the amount insured to be taken as the measure of damages. *Cayon vs. Dwelling-House Ins. Co.*, 552.

See PROOFS OF LOSS 9.

VARIANCE. See APPLICATION 3.

VENDER. See TITLE.

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VOYAGE.

1. CONSTRUCTION OF POLICY.—A marine time-policy permitted the vessel to prosecute voyages anywhere upon the navigable waters of the globe, but upon its back was the indorsement, "vessel to be employed in the Gulf of California, and captain is privileged to act as his own pilot without prejudice to this insurance."

Held, That the indorsement did not mean that the vessel was to be restricted to the gulf, but that while employed there or when navigating there, the captain might act as her pilot. *Gulf of California Nav. Co. vs. State Investment & Ins. Co.*, 579.

2. CONSTRUCTION.—A vessel, whose home port was known to the insurer to be New Orleans, was insured "to navigate the Atlantic Ocean between Europe and America, and to be covered in port and at sea." A clause of the policy was: "Warranted by the assured not to use port or ports in eastern Mexico, Texas, or Yucatan, nor anchorage thereof, during the continuance of this insurance, nor ports in West India Islands between July 15th and October 15, nor ports on the northeast coast of Great Britain beyond the Thames, nor ports on the continent of Europe north of Antwerp, between November 1st and March 1st." The vessel was lost on a voyage from New Orleans to Liverpool, in the Gulf of Mexico. *Held*, that the vessel was covered by the insurance at the time of the loss; the language of the policy describing the trade in which she was engaged, rather than confining the insurance to those portions of her voyages which were in the Atlantic. *Merchants' Mut. Ins. Co. vs. Allen*, 453.

WAGER-CONTRACT. See INSURABLE INTEREST.

WAIVER.

OF BREACH OF CONDITION.—The forfeiture of a policy of insurance on account of a breach of its conditions may be waived, and, when the waiver is made, it will have the same binding force it originally possessed. *Silts vs. Hawkeye Ins. Co.*, 106.

See ACTION 2; ADJUSTER; AGENT 3, 6, 8, 9, 13; APPLICATION 3; ARBITRATION 1, 2, 4; FORFEITURE; ESTOPPEL; LIMITATION; NOTICE; OTHER INSURANCE 1; PREMIUM 4; PREMIUM-NOTE 1, 3; PROOFS OF DEATH; PROOFS OF LOSS; TITLE 2, 3; VALUATION 1, 3.

WAREHOUSEMAN. See BAILEE 1.

WARRANTY.

WHAT IS ESSENTIAL TO.—In a contract of insurance, a warranty is part and parcel of the contract itself, is in the nature of a condition precedent, and, whether material to the risk or not, must be strictly complied with, or literally fulfilled, before the assured can recover on the policy; while a representation, not being of the essence of the contract, but relating to something collateral, or preliminary, and in the nature of an inducement to it, does not, though false, avoid the policy, unless it relates to a fact actually material, or clearly intended to be made material by the agreement of the parties.

The mere fact that a statement is referred to, or even inserted in the policy itself, is not now considered conclusive of its nature as a warranty; but whether it is to be construed as a warranty or as a representation merely, depends rather on the form of the expression, the apparent purpose of the insertion, and its connection with other parts of the application and policy, construed together as an entire contract.

Among the settled rules for the construction of policies of insurance are these: 1st, that all the conditions and obligations of the contract will be construed liberally in favor of the assured, and strictly against the insurer;

2d, that the clearest and most unequivocal language is necessary to create a warranty, and all statements of doubtful meaning will be construed as representations merely; 3d, that even though a warranty in name or form be declared by the terms of the contract, its effect may be modified by other parts of the policy, or of the application, including the questions and answers, so that answers to questions not material to the risk will be construed as warranting only their honesty and good faith.

In this case the contract containing inconsistent expressions—one part tending to show an intention to make the answers warranties, and another treating them as representations—the court holds, 1st, that the answers are not absolute warranties, but in the nature of representations, or, if warranties, only of an honest belief of their truth; 2d, that any untrue statement or suppression or fact material to the risk will vitiate the policy, and thus bar a recovery, whether intentional or within the knowledge of the party or not; 3d, that such statement of a material fact, though untrue, will not avoid the policy, unless the party knew it was false or was negligently ignorant of it; and, 4th, that the inquiries as to the symptoms of disease were not intended to be absolutely material, unless they had existed in such appreciable form as would affect soundness of health, or have a tendency to shorten life. *Alabama Gold Life Ins. Co. vs. Johnson*, 427.

See APPLICATION 6, 13.

WIFE'S POLICY.

1. JURISDICTION OVER ADMINISTRATOR IN ANOTHER STATE.—Section 3,628 of the Revised Statutes of Ohio, which provides that a person may effect insurance on his life for benefit of his widow or children, and the amount of insurance coming due shall be payable to such widow or children exempt from claims of the representatives and creditors of such person, but the amount of annual premiums shall not exceed one hundred and fifty dollars, and in case of excess there shall be paid to the beneficiaries such portion of the insurance as the sum of one hundred and fifty dollars will bear to the whole annual premium, and the residue to the representatives of the deceased, applies as well to a policy issued by a company organized and conducted outside the limits of Ohio as to a policy issued by a company of this State.

In a suit brought against the company, by the widow of such insured person, upon a policy in which she is named as the beneficiary, in a court in the State where such company is located, and in which suit is brought by direction of the court, the company brings into court a sum of money sufficient to satisfy the amount due on the policy, and obtains an order requiring the administrator resident of Ohio, to appear and interplead with such widow as to their respective claims under the policy, service in Ohio of copy of such order, and of citation, upon such administrator, does not give the court jurisdiction of his person, and a judgment in the action purporting to debar him from any claim or right, as against such widow, is, as to him, void. *Cross vs. Armstrong*, 188.

2. CONSTRUCTION AS TO NON-FORFEITURE—EFFECT OF PREMIUM-NOTES—NON-PAYMENT OF INTEREST.—A married woman took out a policy of insurance on her own life, payable ninety days after evidence of her death, or to herself if surviving at the end of fifteen years; all indebtedness to the company on account of the policy being first deducted. The premium was payable yearly, partly by note and partly in cash. The policy was to be void in case of default in payment of premiums, or of interest in advance on the premium-notes, or of the notes, provided that after two annual premiums had been paid the policy might be converted into a "paid-up" policy. In case the policy became void, all payments should be forfeited to the company. The policy contained on its margin, "Non-forfeiture endowment policy with profits." After paying two premiums in notes and cash the insured applied for a paid-up policy, released by quit-claim

to the company all claims on the policy except as to 2-15 of its face amount, and received the same policy back from the company with a statement written on it that it was binding for 2-15 of its face, "subject to the terms and conditions expressed in this policy and in the quit-claim. . . ." She made no further payments on the notes she had given, either of principal or interest.

Held, That the policy was forfeited.

Held, further, that the marginal words, "Non-forfeiture endowment policy with profits," could not be read as a part of the contract.

Held, further, that such a policy was within the scope of Pub. Stat. R. I., cap. 166, § 21.

Held, further, that under Pub. Stat. R. I., cap. 166, a married woman could invest her separate estate in insurance on her life.

Held, further, that the policy was not void ab initio, though the premiums were in part paid by notes which as such did not bind the insured married woman who made them.

Held, further, that the company could set up the forfeiture by non-payment of interest in an action on the policy. *McQuitty vs. Continental Life Ins. Co.*, 950.

See ASSIGNMENT 4; INSOLVENCY 2.

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